140-406

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 167.

CHARLES H. MITCHELL, PLAINTIFF IN ERROR,

vs.

JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT, AND CONRAD N. JORDAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 10, 1887.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the United States circuit court for the seventh circuit, on Monday, the first day of February, 1886, in the December term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and tenth year.

WM. H. BRADLEY, *Clerk.*

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT, and CONRAD N. JORDAN. } 18400. Ejectment.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-sixth day of February, 1883, there was filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, a bond for costs and a transcript of record from the circuit court of Cook county, Illinois, in said above-entitled cause; which said bond and transcript are respectively in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court. March Term, A. D. 1883.

CHARLES H. MITCHELL
vs.
CONRAD N. JORDAN *et al.* } In Ejectment.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and, in default of payment by the defendants of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against my property for any costs taxed against defendants.

Dated this 26th day of February, A. D. 1883.

FRANK I. BENNETT.

(Endorsed:) Filed Feb'y 26, A. D. 1883. Wm. H. Bradley, cl'k.

3 UNITED STATES OF AMERICA, } ss:
State of Illinois, Cook County, }

Pleas before the Honorable John G. Rogers, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the fifteenth day) of January, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

Present: Honorable John G. Rogers, one of the judges of the circuit court of Cook county, State of Illinois; L. L. Mills, State's attorney; Seth F. Hanchett, sheriff.

Attest: JACOB GROSS, *Clerk.*

Be it remembered that heretofore, to wit, on the 9th day of November, 1882, Charles H. Mitchell, by W. Prescott, Esq., his attorney, filed in said court his certain præcipe and declaration, and caused to be issued out of and under the seal of said court the people's writ of summons, directed to the sheriff of Cook county to execute, which said præcipe, declaration, and writ, together with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

4 *Præcipe.*

STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court of Cook County. November Term, A. D. 1882.

CHARLES H. MITCHELL, Plaintiff,
vs.
JABEZ G. SMALE, JOHN I. BENNETT, and FRANK I. BENNETT, Defendants. } Ejectment. Damages, $1,000.00

The clerk of said court will issue a summons in the above-entitled cause to said defendants in a plea of ejectment to the damage of said plaintiff in the sum of one thousand dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the November term of said court, A. D. 1882.

WM. PRESCOTT,
Plaintiff's Attorney.

To Jacob Gross, Esq., clerk.

Chicago, Nov. 8th, 1882.

Declaration.

STATE OF ILLINOIS, }
Cook County. }

In the Circuit Court of Cook County. November, A. D. 1882, Term.

Charles H. Mitchell, plaintiff, complains of Jabez G. Smale, John I. Bennett, and Frank I. Bennett of a plea of ejectment, for that

whereas the plaintiff, on the first day of October, A. D. 1882, was possessed of a certain parcel of land, with the appurtenances, lying and being in the county aforesaid, to wit, the fractional south-
5 west quarter of fractional section twenty (20), in township thirty-seven (37) north, range fifteen (15) east, of the third (3d) principal meridian, according to a plat of the survey thereof made by direction of the United States Government and returned into the General United States Land Office prior to the year A. D. 1850, which said land, appurtenances, and tenements the plaintiff claims in fee simple; and, the plaintiff being so thereof possessed, the defendants afterwards, to wit, on the first day of November, A. D. 1882, entered into the said land, appurtenances, and tenements and now unlawfully withhold from the plaintiff the possession thereof, to the damage of the plaintiff of one thousand dollars, and therefore he brings his suit.

WILLIAM PRESCOTT,
Att'y for Plaintiff.

Summons.

STATE OF ILLINOIS, } ss:
County of Cook, }

The people of the United States of *Illinois* to the sheriff of Cook county, Greeting:

We command you that you summon Jazeb G. Smale, John I. Bennett, and Frank I. Bennett, if they shall be found in your county, personally to be and appear before the circuit court of Cook county on the first day of the term thereof to be holden at the court-house, in the city of Chicago, in said Cook county, on the third
6 Monday of November, A. D. 1882, to answer unto Charles H. Mitchell in a plea of ejectment to the damage of said plaintiff, as it is said, in the sum of one thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Jacob Gross, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 9th day of November, A. D. 1882.

[SEAL.] JACOB GROSS, *Clerk.*

Endorsed: Received at — o'clock — m., Nov. 9th, 1882. O. L. Mann, sheriff.

P'd 2.50. Served this writ by reading the same to the within-named defendant, John I. Bennett, this 9th day of November, 1882.

O. L. MANN, *Sheriff,*
By J. C. ROWLEY, *Deputy.*

I hereby appoint Wm. Becker my special deputy to serve this writ on the within-named defendant, Jabez G. Smale, this 9th day of Nov., 1882.

O. L. SMALE, *Sheriff.*

STATE OF ILLINOIS, } ss:
Cook County, }

Wm. Becker, being first duly sworn, deposes and says that he served this writ by reading the same to the within-named defendant, Jabez G. Smale, the 10th day of November, 1882; other defendant not found.

WM. BECKER,
Special Deputy.

7 Subscribed and sworn to before me this 14th day of November, 1882.

W. E. WAITE,
[SEAL.] *Notary Public.*

Filed this 20th day of November, A. D. 1882.

JACOB GROSS, *Clerk.*

W. PRESCOTT, *Pl'ff's Att'y.*

And thereupon, on the 2nd day of December, 1882, the demurrer of defendants was filed in said cause in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court. Nov. Term, 1882.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, and FRANK I. BENNETT. } Ejectment.

Now come said defendants, Jabez G. Smale, John I. Bennett, and Frank I. Bennett, by J. I. & F. I. Bennett, their attorneys, and defend, &c., when, &c., and say that the said declaration and each count thereof and the matters therein contained in manner and form as the same are above set forth are not sufficient in law for the plaintiff to maintain his aforesaid action, and that they, the defendants, are not bound by law to answer the same; and this he is ready to verify.

Wherefore, for want of a sufficient declaration in this behalf,
8 the defendant prays judgment, and that the plaintiff may be barred from maintaining his aforesaid action, &c.

J. I. & F. I. BENNETT,
Att'ys for Defendant.

Filed in circuit court Nov. 21, 1882.

JACOB GROSS, *Clerk.*

P'd 1.50.

And thereupon, on the 2nd day of December, 1882, a certain affidavit and notice were filed in said cause in words and figures following, to wit:

Circuit Court of Cook County. December Term, A. D. 1882.

CHARLES H. MITCHELL
vs.
JOHN I. BENNETT *et al.*

STATE OF ILLINOIS, *Cook County,* } *ss:*

The affiant, Hugh L. Mason, having been duly sworn, deposes and says that on the 8th day of November, 1882, he served a notice in ejectment on John I. Bennett, demanding possession of the premises known and described as follows:

The fractional S. W. ¼ of section 20, township 37 north, range 15 east, of 3rd P. M., Cook county, Illinois.

That this affiant upon delivering said notice to said Bennett inquired how he, the said Bennett, held or claimed to hold said property; that thereupon the said Bennett replied that he owned and held said property under a fee-simple title.

HUGH L. MASON.

Subscribed and sworn to before me this 2d day of December, 1882.

JACOB GROSS, *Clerk.*

9 *Notice of Motion.*

STATE OF ILLINOIS, *Cook County,* } *ss:*

Circuit Court. Nov. Term, 1882.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, and FRANK I. BENNETT. } Ejectment.

To William Prescott, Esq., att'y for plaintiff:

Please take notice that on Saturday, Nov. 25, at 10 a. m., or so soon thereafter as counsel can be heard, we shall, before his honor Judge Rogers, in the room usually occupied by him as a court-room, in said county, move the court to substitute Conrad N. Jordan as sole defendant in said cause, said motion being based upon an affidavit, a copy of which is herewith handed you, and for other purposes, when and where you may appear and resist if you see fit.

J. I. & F. I. BENNETT,
Att'ys for Def'ts.

STATE OF ILLINOIS, *Cook County,* } *ss:*

Frank I. Bennett, being duly sworn, says that he served the above notice on William Prescott, Esq., by leaving a copy thereof with the person in charge of his office, on Nov. 24, 1882.

FRANK I. BENNETT.

10 Subscribed and sworn to before me this 25th day of Nov., 1882.

JACOB GROSS, *Clerk.*

It is agreed the above notice may stand for Sat., Dec. 2nd, 1882, at same hour, before same judge.

Dec. 1st, 1882.

J. I. & F. I. BENNETT,
Att'ys for Def't.

And thereupon, on the same day, to wit, the 2nd day of December, 1882, a certain order was made and entered of record and a certain bill of exceptions was filed in said cause; which said order and bill of exceptions are in the words and figures following, to wit:

Order, Dec. 2nd, 1882.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, & FRANK I. BENNETT. } 3741. Ejectment.

This day came Conrad N. Jordan, and on his motion it is ordered that he, the said Conrad N. Jordan, be, and he is hereby, made a party codefendant in said cause.

Bill of Exceptions.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Circuit Court. Nov. Term, 1882.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT, and CONRAD N. JORDAN. } Ejectment.

11 And now, on this second day of December, 1882, comes the parties, by their attorneys, and also comes Conrad N. Jordan, by his attorneys, and thereupon a motion was made by the said Jordan to be substituted as sole defendant for and in the place of said defendants, Jabez G. Smale, John I. Bennett, and Frank I. Bennett; to which motion the said defendants, Jabez G. Smale, John I. Bennett, and Frank I. Bennett, consented in writing and requested the court to grant the same; which said motion and consent thereto, in writing, *is* in the words and figures following, to wit:

Motion.

STATE OF ILLINOIS, } ss :
Cook County, }

Circuit Court. Nov. Term, 1882.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, and FRANK I. BENNETT. } Ejectment.

And now comes Conrad N. Jordan, by J. I. & F. I. Bennett, his attorneys, and moves the court to be substituted as sole defendant in said above-entitled suit, said motion being based upon the affidavit filed herewith.

J. I. & F. I. BENNETT,
Att'ys for said Jordan.

Jabez G. Smale, John I. Bennett, and Frank I. Bennett, the above-named defendants, by J. I. & F. I. Bennett, their attorneys, hereby consent to the above motion, and request that it be done in accordance with the statute in such case made and provided.

J. I. & F. I. BENNETT,
Att'ys for Defendants.

12 Filed Dec. 2, 1882.

JACOB GROSS, *Clerk.*

And at the same time of filing said motion said Jordan entered his appearance in said cause in the words and figures following, to wit:

Appearance of C. N. Jordan.

STATE OF ILLINOIS, } ss :
Cook County, }

Circuit Court. Nov. Term, 1882.

CHAS. H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, and FRANK I. BENNETT. } Ejectment.

I do hereby enter my appearance in the above cause and waive service of process therein, provided I am substituted as sole defendant in said cause in place of Jabez G. Smale, John I. Bennett, and Frank I. Bennett. J. I. & F. I. Bennett are authorized to appear for me as my attorneys for the purpose of said substitution and other purposes.

CONRAD N. JORDAN.

Filed Dec. 2d, 1882.

JACOB GROSS, *Clerk.*

And thereupon, to sustain said motion, the affidavit of said Jordan was read to the court; which affidavit is in the words and figures following, to wit:

13 *Affidavit of C. N. Jordan.*

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court. Nov. Term, 1882.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, and FRANK I. BENNETT. } Ejectment.

Conrad N. Jordan, being duly sworn, says that the said defendants, John I. & F. I. Bennett, conveyed the property involved in the above-entitled suit to affiant before said suit was commenced, and on the 1st day of Nov., 1882, by deed dated and acknowledged of that date and in pursuance of a contract executed Sept. 20, 1882; that at and prior to said last-mentioned date said defendant, Jabez G. Smale, had been in possession of a part of said premises, and on the 26 day of October, 1882, went into the possession of the residue of said premises; that said Smale executed a written lease as to a part of said premises Aug. 27, 1882, and a further written lease as to the residue of said premises Oct. 26, 1882; that said leases were assigned to affiant, the one on and the other before Nov. 1, 1882, by John I. Bennett, to whom they ran, and that when the said suit was commenced the said defendant Smale was the tenant of affiant, and the said John I. & Frank I. Bennett had no interest in said property or any of it or the possession thereof except as holding under affiant.

Affiant therefore prays that he may be substituted as sole
14 defendant for the said John I. Bennett, Frank I. Bennett, and Jabez G. Smale, his tenants as aforesaid.

CONRAD N. JORDAN.

Subscribed and sworn to before me this 21st day of November, A. D. 1882.

JNO. L. NISBET,
Notary Public # 20, New York County.

Filed Dec. 2, 1882.

JACOB GROSS, *Clerk.*

Thereupon the court denied the said motion to substitute said Jordan as sole defendant; to which ruling of the court in denying said motion the said defendants and every of them then and there excepted.

Whereupon the said Conrad N. Jordan moved the court to be admitted to defend the said cause as landlord and as codefendant with the said Jabez G. Smale, John I. & Frank I. Bennett, without prej-

udice to his rights to except to the said former ruling of the court, which last motion was thereupon allowed by the court, and said Jordan was admitted as a party codefendant in said cause and to defend said cause as landlord.

And inasmuch as the matters and things aforesaid are not matters of record, the said defendants then and there prayed that this their bill of exceptions might be then and there and at the same time of said rulings signed, sealed, and settled by the court, which is accordingly done.

JNO. C. ROGERS. [SEAL.]

Dec. 2nd, 1882.

15 And thereupon, on the 14th day of December, 1882, a certain petition and bond for removal was filed in said cause in words and figures following, to wit:

In the Circuit Court of Cook County, State of Illinois. Nov. Term, A. D. 1882.

CHARLES H. MITCHELL, Plaintiff,
vs.
JABEZ G. SMALE, JOHN I. BENNETT, Frank I. Bennett, and Conrad N. Jordan, Defendants.

Petition for Removal to the Circuit Court of the United States for the Northern —.

To said circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds the sum or value of five hundred dollars, exclusive of costs.

That the controversy in said suit is between citizens of different States, and that the petitioner, who is the defendant, was at the time of the commencement of this suit and now is and at the time he became such defendant was a citizen of the State of New York; that neither said John I. Bennett nor said Frank I. Bennett were nor were either of them in possession of said lands described in said declaration at the time of the commencement of said suit, nor have they or either of them since been in possession thereof, nor did they or either of them own said real estate or any portion thereof
16 at the said time of the commencement of said suit, nor have they or either of them since acquired title thereto; that they are unnecessary and improper parties defendant to said suit; that said defendant, Jabez G. Smale, was at the time of the commencement of this suit and still is the tenant of petitioner; that petitioner is the owner of the legal title to said land; that petitioner was admitted as defendant in said cause to defend as landlord; that the controversy in said suit respects the legal title to said lands, and that the sole controversy in said cause is between your petitioner and said plaintiff; and that Charles H. Mitchell, who is sole plaintiff, was then and still is a citizen of the State of Illinois.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States

on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be r - moved into said circuit court of the United States in and for the northern district of Illinois; and he will ever pray.

CONRAD N. JORDAN, *Petitioner.*

J. I. & F. I. BENNETT,
Att'ys for Petitioner.

17 STATE OF ILLINOIS, } ss:
Cook County, }

I, Frank I. Bennett, being duly sworn, do say that I am a member of the firm of J. I. & F. I. Bennett, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

FRANK I. BENNETT.

Subscribed and sworn to before me this 14th day of December, A. D. 1882.

JACOB GROSS, *Clerk.*

Bond.

Know all men by these presents that I, Conrad N. Jordan, as principal, and John I. Bennett and Frank I. Bennett, as sureties, are held and firmly bound unto Charles H. Mitchell in the penal sum of five hundred dollars; — the payment thereof, well and truly to be made, unto the said Charles H. Mitchell, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: that the said Conrad N. Jordan having petitioned the circuit court of Cook county, State of Illinois, for the removal of a certain cause therein pending, wherein Charles H. Mitchell is plaintiff and Conrad N. Jordan is defendant,
18 to the circuit court of the United States in and for the northern district of Illinois:

Now, if the said Conrad N. Jordan, your petitioner, shall enter into said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 14th day of December, A. D. 1882.

CONRAD N. JORDAN. [SEAL.]
JOHN I. BENNETT. [SEAL.]
FRANK I. BENNETT. [SEAL.]

STATE OF ILLINOIS, } ss:
Cook County, }

We, John I. Bennett and Frank I. Bennett, of said county, the sureties named in the foregoing bond, being severally duly sworn, do depose and say that we are both residents of the State of Illinois and property-holders therein; that we are each worth separately the sum of five hundred dollars over and above all our debts and liabilities; that we both have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

We further state that we severally executed the bond hereto annexed as surety, that we know the handwriting of Conrad N.
19 Jordan, who executed the same as principal, and that his signature thereto is genuine.

JOHN I. BENNETT.
FRANK I. BENNETT.

Subscribed and sworn to before — this 14th day of December, A. D. 1882.

JACOB GROSS, *Clerk.*

And thereupon, on the 20th day of December, 1882, certain objections were filed and a certain order was made and entered of record in said cause; which said objections and order are in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court. Nov. Term, A. D. 1882.

CHARLES H. MITCHELL } Ejectment.
vs.
JABEZ G. SMALE *et al.* }

And now comes the said plaintiff, by his att'y, and objects to an order for removal of said cause into the circuit court of the United States for the northern district of Illinois as prayed by the petition of Conrad Jordan herein, for the following reasons, namely:

First. The bond presented with the said application is *informed* and insufficient, because in the condition thereof it is recited, among other things: "Said Conrad N. Jordan having petitioned the circuit court of Cook county, Illinois, for the removal of a cer-
20 tain cause therein pending, wherein Charles H. Mitchell is plaintiff and Conrad N. Jordan is defendant:" * * * and again, * * * "Now, if the said Conrad N. Jordan shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully and improperly removed." * * *

Second. Because the petition is insufficient, both in form and substance. The law is that such petition should set forth the facts upon which a judicial decision of the right of removal can be rendered.

Third. The pretended petition in this cause fails to set forth any facts showing the right of removal under the law.

Fourth. The question involved in the application for a removal in this cause is of citizenship of all the parties, plaintiff and defendant, and if the petition set forth such citizenship it would positively appear that the plaintiff Mitchell is a citizen of Illinois and all the other three defendants, namely, the two Bennetts and Smale, also citizens of Illinois, and one defendant only, if he be a defendant at all within the meaning of the "removal" laws, namely, Conrad N. Jordan, being a citizen of the State of New York.

Fifth. The order to remove said cause as prayed, as aforesaid, is not a matter of counsel, but is a matter that properly calls forth the judicial decision upon all the facts as found in the case—as well the files, pleadings, and records thereof as the petitioner for "removal."

21 It is not a mere clerical duty, but an act of proper judicial determination.

WM. PRESCOTT,
Att'y for Pl'tf.

Order, Dec. 20th, 1882.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT, and CONRAD JORDAN.
} 42924, 3741. Ejectment.

This day came the attorney for said defendants and moves the court to make the said defendant, Conrad N. Jordan, the sole and only defendant in said cause, and the court, after hearing arguments of counsel thereon and being fully advised in the premises, doth overrule said motion; to which ruling of the court the said attorney for defendants now here excepts; and thereupon, by agreement of counsel, it is ordered that the foregoing order be, and it is, entered *nunc pro tunc* as of December 2nd, 1882, preceding the order entered on that day making said Conrad N. Jordan a party defendant herein; and thereupon came on to be heard the petition filed herein for the removal of said cause into the United States circuit court for the northern district of Illinois, and the court, after hearing the objections thereto this day filed by said plaintiff and arguments of counsel and not yet being fully advised in the premises, takes said petition under advisement.

And thereupon, on the 15th day of January, 1883, a certain order was made and entered of record in said cause; which said

22 order is in the words and figures following, to wit:

Order, January 15th, 1883.

CHARLES H. MITCHELL *vs.* JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT, and CONRAD N. JORDAN.	42924, 3741. Ejectment.

This day came on to be heard the motion of said defendant, Conrad N. Jordan, to remove said suit into the United States circuit court for the northern district of Illinois, and was further argued by counsel; and thereupon the said defendant, Conrad N. Jordan, by his attorney, moves the court for leave to amend the petition and bond filed for said removal; to which plaintiff's attorney objects; and the court, after hearing arguments of counsel and being fully advised in the premises, sustains said motion, and doth order that said defendant Jordan be, and he is, allowed to amend his said petition and bond; to which ruling and order of the court the said plaintiff, by his attorney, now here excepts.

And thereupon, on the 23rd day of January, 1883, a certain petition and bond for removal was filed in said cause; which said petition and bond are in words and figures following, to wit:

23 STATE OF ILLINOIS, *Cook County,* } *ss:*

Circuit Court. Jan. Term, 1883.

CHARLES H. MITCHELL, Plaintiff, *vs.* JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. Bennett, Conrad N. Jordan, Defendants.	Petition for Removal to the Circuit Court of the United States for the Northern District of Illinois.

To said circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds the sum or value of five hundred dollars, exclusive of costs.

That the controversy in said suit is between citizens of different States, and that the petitioner, who is defendant, was at the time of the commencement of this suit and now is and at the time he became such defendant was a citizen of the State of New York; that neither said John I. Bennett nor said Frank I. Bennett were nor were either of them in possession of said lands described in said declaration at the time of the commencement of said suit, nor have they or either of them since been in possession thereof, nor did they or either of them own said real estate or any portion thereof at the said time of the commencement of said suit, nor have they or either of them since acquired title thereto; that they are unnecessary and improper parties defendant to said suit; that said defendant, Jabez G. Smale, was at the time of the commencement of this suit
24 the tenant of petitioner; that petitioner is the owner of the legal title to said land; that petitioner was admitted as defendant

in said cause to defend as landlord on the 2nd day of December, A. D. 1882; that subsequent thereto and on the 19th day of January, 1883, and after the said suit became a *lis pendens* as against petitioner, the said Jabez G. Smale, by agreement with petitioner, surrendered and cancelled the lease of said lands involved in this suit, which he held at the time of the commencement of this suit, and received and executed and entered into a new lease from and with petitioner of all of the lands involved in this suit of the said date in place of the said original lease in force when this suit was commenced; that in and by the said new and substituted lease the said Smale expressly agrees to hold said premises subject to the *lis pendens* of this suit as against petitioner and to abide by any final judgment which may be rendered in this suit against petitioner and to be subject to any process which may be issued thereon, and that he, the said Smale, hath no rights under said substituted lease to the premises therein contained after any such final judgment against petitioner shall have rendered.

Your petitioner states that said suit is one arising under the laws of the United States in this, to wit, that plaintiff seeks in and by said suit to recover lands embraced in a survey of public lands made by the Government of the United States in 1874, embracing
25 a part of said section twenty (20), t'p 37 N., R. 15 E., 3rd P. M., in Illinois, and patents issued under said survey under which your petitioner deraigned title in fee simple before the commencement of said suit and in him then vested by conveyance from the patentee.

That the plaintiff claims that he is seized of the fractional tract described in the declaration as the grantee of one Horatio D. De Witt; that the said survey, patents, and deeds to petitioner are not made in pursuance of the acts of Congress and laws of the United States relating to the surveying and disposition of the public lands of the United States, and that said act of Congress and laws have been misconstrued by the said land department and disregarded, and that said survey, patents, deeds, and the proceedings of the land department are illegal and void and in violation of the contract rights of said Mitchell under the laws of the United States; that by virtue of the alleged ownership of said fractional tract described in the declaration he, the plaintiff, under and in pursuance of said act of Congress and laws of the United States, is also the owner of said lands so owned by your petitioner by virtue of said survey of 1874 and patents and deeds thereunder. This petitioner claims title in fee to said lands other than said fractional tract by virtue of said survey of 1874, said patents and deeds issued thereunder in pursuance of the act of Congress aforesaid and laws of the United
26 States, and therefore states that said suit is one arising under the laws of the United States entitling this petitioner to a removal of the suit under the act of Congress entitled "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from the State courts, and for other purposes," in force March 3rd, 1875, for that cause alone.

And your petitioner offers herewith a bond, with good and suffi-

cient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Illinois; and he will ever pray.

CONRAD N. JORDAN, *Petitioner.*

J. I. & F. I. BENNETT,
Att'ys for Petitioner.

27 STATE OF ILLINOIS, } ss:
Cook County, }

I, Frank I. Bennett, being duly sworn, do say that I am a member of the firm of J. I. & F. I. Bennett, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

FRANK I. BENNETT.

Subscribed and sworn to before me this 22 day of January, A. D. 1883.

JACOB GROSS, *Clerk.*

Know all men by these presents that I, Conrad N. Jordan, as principal, and John I. Bennett and Frank I. Bennett, as sureties, are held and firmly bound unto Charles H. Mitchell in the penal sum of five hundred dollars; — the payment whereof, well and truly to be made unto the said Charles H. Mitchell his heirs and assigns, we do bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: that the said Conrad N. Jordan having petitioned the circuit court of Cook county, State of Illinois, for the removal of a certain cause therein pending, wherein Charles H. Mitchell is plaintiff and Conrad N. Jordan and others are defendants, to the circuit court of the United States in and for the northern district of Illinois:

28 Now, if the said Conrad N. Jordan, your petitioner, shall enter into said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 22d day of January, A. D. 1883.

CONRAD N. JORDAN.
JOHN I. BENNETT.
FRANK I. BENNETT.

Witness:
C. N. J.
B. F. AUSTIN.

STATE OF ILLINOIS, } ss:
Cook County, }

We, John I. Bennett and Frank I. Bennett, of said county, the sureties named in the foregoing bond, being severally duly sworn, do depose and say that we are both residents of the State of Illinois and property-holders therein; that we are each worth separately the sum of five hundred dollars over and above all our several debts and liabilities; that we both have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

29 We further state that we severally executed the bond hereto annexed as surety; that we know the handwriting of Conrad N. Jordan, who executed the same as principal, and that his signature thereto is genuine.

JOHN I. BENNETT.
FRANK I. BENNETT.

Subscribed and sworn to before me this 22nd January, A. D. 1883.
JACOB GROSS, *Clerk.*

And thereupon, on the 2nd day of February, 1883, certain objections to removal were filed in said cause; which objections are in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court, Cook County. January Term, A. D. 1883.

CHARLES H. MITCHELL } Ejectment.
vs.
JABEZ G. SMALE *et al.* }

And now, on this day, comes again the said plaintiff, by William Prescott, his attorney, and again and further objects to an order for the removal of said cause into the circuit court of the United States for the northern district of Illinois, as again prayed by the petitioner, Conrad N. Jordan, for the following reasons, namely:

30 First. This is not an amendment, but a new and other and further petition for removal of said cause into the court last aforesaid.

Second. Said further and other petition was not filed in proper and due time to entitle petitioner to a removal.

Third. The change in the lease from Smale to Jordan, as set forth in said petition, was obviously made for the sole purpose to create a jurisdiction or a case for the jurisdiction of the United States courts, and therefore inadmissible.

Fourth. Because neither of said petitions or bonds or either or all of them are sufficient, either in form or substance, to justify the court in ordering the removal or transfer of said cause, as prayed in and by the said petitioner's petition herein.

Fifth. The subject-matter upon which the 2nd petition is founded

is not properly shown or set forth nor as required by the laws and decisions relating thereto.

Sixth. The order to remove said cause as prayed is not an order or matter of course, but such order involved a judicial determination by the State court.

Hence the petitions or petitions and pleadings and other files and papers in the case, taken together, should show and set forth facts from and upon which a judicial determination could or can be arrived at.

Seventh. Neither the petitions by themselves nor the petitions taken with the other pleadings and papers in the case show or set forth such facts.

WILLIAM PRESCOTT,
Att'y for Pl'ff.

And thereupon, on the 6th day of February, 1883, the following proceedings were had and entered of record in said cause in words and figures following, to wit:

CHARLES H. MITCHELL *vs.* JABEZ G. SMALE, JOHN I. BENNETT, Frank I. Bennett, and Conrad N. Jordan.	42924, 3741. Ejectment.

This day came on to be heard the petition of said defendant, Conrad N. Jordan, for the transferring of said cause into the United States circuit court for the northern district of Illinois, and was argued by counsel, and the court, being fully advised in the premises, doth sustain said petition, and thereupon, on motion of said petitioner by his attorney, leave is granted him to perfect the bond offered *nunc pro tunc* as of January 22nd, 1883; to all of which the said plaintiff, by his attorney, now here excepts, and said petitioner now offers a perfected bond as security in the penal sum of five hundred dollars, with John I. Bennett and Frank I. Bennett as sureties, conditioned that said petitioner will enter into said circuit court of the United States, on the first day of the next session, a copy of the record in said suit, and, the court being satisfied with the surety offered, it is ordered that said cause be, and it hereby is,
32 transferred to said United States circuit court for the northern district of Illinois according to the act of Congress in such case made and provided.

UNITED STATES OF AMERICA, *State of Illinois*, } ss.:

I, Jacob Gross, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court on the common-law side thereof between Charles H. Mitchell, plaintiff, and Jabez G. Smale *et al.*, defendants.

In witness whereof I have hereunto set my hand and affixed the

seal of said court, at Chicago, in said county, this 12th day of February, A. D. 1883.

[SEAL.] JACOB GROSS, *Clerk.*

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John G. Rogers, presiding judge of the circuit court of Cook county, in the State of Illinois, hereby certify that Jacob Gross, who signed the above certificate, was at the time of signing the same and is now clerk of the said circuit court of Cook county, duly commissioned and qualified; that said court is a court of record,
33 having a clerk and seal; that said attestation is in due form and by the proper officer according to the laws of the State of Illinois, and that the above signature of said clerk is genuine.

Witness my hand and seal, at Chicago, in said county of Cook, this 12th day of February, A. D. 1883.

JNO. G. ROGERS, [SEAL.]
Judge of the Circuit Court of Cook County.

Received of J. I. Bennett 8.00 dollars for copy.

JACOB GROSS, *Clerk.*

Endorsed: Filed Feb'y 26th, 1883. Wm. H. Bradley, clerk.

34 Afterwards, to wit, on the fifth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL } Ejectment.
vs.
JABEZ G. SMALE *et al.* }

Now comes the plaintiff, by his attorney, and moves the court to remand this cause.

35 Afterwards, to wit, on the fifteenth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL } Ejectment.
vs.
JABEZ G. SMALE *et al.* }

Now come the parties, by their attorneys, and now comes on to be heard the motion of the plaintiff entered herein to remand this cause, and after hearing the arguments of counsel the court overrules said motion.

36 On the same day, to wit, on the fifteenth day of March, 1883, there was filed in said clerk's office a bill of exceptions in said entitled cause; which said bill of exceptions is in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the Circuit Court, to the March Term, A. D. 1883.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, & FRANK I. BENNETT. } Ejectment.

And now, on this fifteenth day of March, A. D. 1883, come the parties above named, by their respective counsel, and also the said Conrad N. Jordan, by his counsel; and thereupon a motion in writing on behalf of plaintiff to remand said suit to said circuit court of Cook county, Illinois, was read and, by leave of court, filed in said cause; which said motion is in the words and figures following, to wit:

37 UNITED STATES OF AMERICA,
Northern District of Illinois.

Circuit Court.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE *et al.* } Ejectment.

In the matter of removal of said suit from the circuit court of Cook county, Illinois, into the circuit court of the United States for the northern district of Illinois.

The plaintiff, Charles H. Mitchell, comes and moves this honorable court to remand said suit to the said circuit — of Cook county for the reasons following, viz:

First. Because the petition for removal herein was not filed in apt time.

Second. It does not set forth the particular citizenship of the parties to the suit.

Third. It does not set forth facts from which it can be determined whether in said suit there exists or not a controversy which is wholly between citizens of different States which can be wholly determined as between them.

38 Fourth. It does not set forth facts from which it can be determined whether said suit arises under the Constitution or laws of the United States or treaties thereof. It does not specify the law under which the suit is supposed to arise, nor do the petitions,

alone or taken together with the pleadings in the suit, show any of the facts necessary to require or authorize this honorable court to take or retain jurisdiction thereof.

Fifth. And plaintiff denies that the controversy in said suit is between citizens of different States, or that the sole controversy in said cause is between the petitioner Jordan and the plaintiff. On the contrary, plaintiff avers that the said Smale was at the time of the commencement of this suit, at the time of filing the petitions for removal herein, and still continues to be a citizen of the State of Illinois and then was and still is, under and by virtue of the laws of the State of Illinois, as plaintiff is advised, a necessary party defendant in this suit.

And plaintiff denies that there is a controversy in said suit which is wholly between citizens of different States.

And plaintiff denies that this suit arises under the Constitu-
39 tion or laws of the United States or treaties made under their authority.

And plaintiff denies that he claims that said act of Congress and laws or any act of Congress or law of the United States has or have been misconstrued by the Land Department in making the survey of 1874, as charged and set forth in the petition for removal herein. On the contrary, plaintiff avers that said survey of 1874 was made without any authority of any act of Congress or any constitutional provision or treaty whatever, so admitted and so confessed by the officers of the Land Department of the United States who ordered and allowed the said survey of 1874 to be made.

And plaintiff denies that he claims that said survey of 1874 and the deeds and patents and proceedings thereunder are void under and by virtue of any particular law of the United States or constitutional provision within the meaning of the act Congress of 1875 relating to the removal of causes.

But plaintiff avers and claims that in so far as said survey and patents and proceedings (if any) are in conflict with his rights, if at all, to the lands he claims in and by his said declaration herein the same are void and of no effect.

40 Not by virtue of any act of Congress or constitutional provision, but by the rules of the common law and the laws of the State of Illinois and the decisions of her courts which have become rules of property in this and like cases; and plaintiff prays this may be taken as a plea to the petitions for removal herein, and plaintiff prays that said suit may be remanded to said State court in accordance with the laws of the United States.

WM. PRESCOTT,
Att'y for Charles H. Mitchell.

STATE OF ILLINOIS, } ss:
Cook County, }

In Circuit Court of the United States, Northern District of Illinois.

Charles H. Mitchell, the plaintiff in the above and foregoing entitled suit, being first duly sworn, upon his oath says that he has

read the foregoing instrument of writing, and that he believes that each and every allegation thereof is true in substance and in fact.

—— ——.

Subscribed & sworn to before me by Charles H. Mitchell this the — day of March, A. D. 1883.

—— ——.

(Endorsed:) Filed March 15, 1883. Wm. H. Bradley, cl'k.

41 And also a stipulation and agreement by and between the parties in said cause having been entered into in relation to said cause; which said stipulation is in the words and figures following:

42 UNITED STATES OF AMERICA, }
Northern District of Illinois. }

In the Circuit Court by "Removal." March Term, A. D. 1883.

CHARLES H. MITCHELL }
vs. } Ejectment.
JABEZ G. SMALE *et al.* }

It is hereby stipulated by and between the parties hereto that said Jabez G. Smale was at the commencement of this suit and ever since has been a citizen of the State of Illinois, and that the November term of the circuit court of Cook county, Illinois, began on the twentieth day of November and ended on the sixteenth day of December, A. D. 1882.

(The seventeenth day of said month being Sunday.)

That the December term thereof began on the eighteenth day of December, A. D. 1882, and ended January the thirteenth, A. D. 1883.

43 (The fourteenth day of said month being Sunday.)

That the January term began January the fifteenth and ended February the seventeenth, A. D. 1883.

(The eighteenth day of said month being Sunday.)

And that this stipulation may be filed as of this fifteenth day of March, A. D. 1883, and shall have and may be used with the same force and effect as proof duly made of the above matters upon the hearing of the motion to remand said suit to said State circuit court, and that the same may be preserved in the bill of exceptions herein.

WM. PRESCOTT,
Counsel for Pl't'ff.
JOHN I. BENNETT,
Counsel for Def't.

(Endorsed:) Filed March 15, 1883. Wm. H. Bradley, cl'k.

44 And thereupon the court then and there denied the said motion to remand said suit to said circuit court of said Cook county; to which ruling of the court in denying said motion the

said plaintiff then and there excepted; and, forasmuch as the matters and things aforesaid are not matters of record, the said plaintiff, by his counsel, then and there prayed that this his bill of exceptions might be then and there and at the same time of said rulings and denial of said motion signed, sealed, and settled by the court, which is accordingly done.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed March 15, 1883. Wm. H. Bradley, cl'k.

45 Afterwards, to wit, on the twenty-second day of December, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL *vs.* J. G. SMALE *et al.* } Ejectment.

Now comes the plaintiff, by his attorney, and confesses the demurrer of the defendants to the declaration herein, and, on motion of the plaintiff's attorney, leave is given to amend said declaration by filing three additional counts to the same.

46 Afterwards, to wit, on the twenty-third day of December, 1884, came the defendants, by their attorneys, and filed in said clerk's office their plea in said entitled cause; which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA, *Northern District of Illinois.* }

In the Circuit Court. December Term, A. D. 1884.

JABEZ G. SMALE *et al.* *ats.* CHARLES H. MITCHELL. } In Ejectment.

And the defendants, by John B. Hawley and John I. Bennett, their attorneys, come and defend the wrong and injury when, etc., and say that they are not guilty of unlawfully withholding the land, appurtenances, and tenements in any of the counts in the said amended declaration mentioned or any part thereof in any manner and form as the plaintiff has above and therein thereof complained against them; and of this the defendants put themselves upon the county, &c.

JOHN B. HAWLEY AND
JOHN I. BENNETT,
Att'y for Def'ts.

(Endorsed:) Filed Dec. 23, 1884. Wm. H. Bradley, cl'k.

47 Afterwards, to wit, on the 26th day of December, 1884, came the plaintiff, by his attorneys, and filed in said clerk's office three additional counts in said entitled cause; which said counts are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the Circuit Court by Removal, &c. December, A. D. 1884, Term.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE. } In Ejectment.

By leave of court first had and obtained the plaintiff files three additional counts to the declaration herein as follows, to wit:

1 add'l. For that whereas also the plaintiff on the first day of October, A. D. 1882, was possessed of a certain other parcel of land, with the appurtenances, *and* lying and being in the county of Cook and State of Illinois, to wit: The fractional southwest quarter of fractional section twenty (20), in township thirty-seven (37) north, range 15 east, of the 3rd P. M., according to the official plat of the survey thereof filed in the land office prior to year 1850; which said land, appurtenances, and tenements plaintiff claims in fee simple.

2nd add'l. And for that whereas also the plaintiff on the
48 first day of October, A. D. 1882, was possessed of certain other parcels of land, with the appurtenances, lying & being in the county of Cook and State of Illinois, described as follows, to wit: The west half of the southwest quarter and the south half of the east half of the southwest quarter and lot two (2) of the southwest quarter of section twenty (20), in township 37 north, range 15 east, of the 3rd principal meridian, according to the survey thereof by the United States authorities in the year A. D. 1874; which said land, appurtenances, and tenements plaintiff claims in fee simple.

3rd add't'l. And for that whereas also the plaintiff on the first day of October, A. D. 1882, was possessed of a certain other parcel of land, with the appurtenances, lying and being in the county of Cook and State of Illinois, to wit: Beginning at the northeast corner of the fractional southwest quarter of fractional section 20, in township 37 north, range 15 east, of the 3rd P. M., and running thence south along the east line of said fractional quarter section to Wolf Lake; thence along in a southwesterly direction with the meanders of said lake to a point where the south line of said fractional southwest quarter section intersects with said lake; thence west along the said line of said fractional southwest quarter of section twenty (20) to a point where said line intersects with the water of what is now commonly called Hyde Lake; thence in a northerly direction
49 along with the meanders of said lake to a point where the north line of said fractional quarter section intersects with the waters of said so-called Hyde lake; thence along in an easterly direction with the said north line to the place of beginning; which

said land, together with all appurtenances and tenements, plaintiff claims in fee simple.

And, the plaintiff being so also possessed of the said lands, appurtenances, and tenements so described in the three additional counts herein, the defendant afterwards, to wit, on the first day of November, A. D. 1882, entered into said lands, appurtenances, and tenements, and now also withholds from the plaintiff the possession thereof, to the damage of the plaintiff of one thousand dollars, and therefore he brings suit.

WM. PRESCOTT,
Att'y for Pl't'ff.

(Endorsed:) Filed Dec. 26, 1884. Wm. H. Bradley, cl'k.

50 Afterwards, to wit, on the fifth day of January, 1885, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

CHARLES H. MITCHELL *v.* JABEZ G. SMALE *et al.* } Ejectment.

It is hereby stipulated and agreed that the above-entitled cause may be tried and determined by the court without the intervention of a jury.

Chicago, January 3, 1885.

WM. PRESCOTT,
Att'y for Pl't'ff.
JOHN I. BENNETT,
JOHN B. HAWLEY,
Att'ys for Def'ts.

(Endorsed:) Filed Jan'y 5, 1885. Wm. H. Bradley, cl'k.

51 Afterwards, to wit, on the tenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL *vs.* J. G. SMALE *et al.* } Ejectment.

Now come the parties, by their attorneys, and upon issue joined by agreement of the parties, as per stipulation filed, they waive the intervention of a jury and for trial put themselves upon the court,

and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

52 Afterwards, to wit, on the fourteenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

Now come again the parties, by their attorneys, and after hearing additional evidence without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the fifteenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

Now come again the parties, by their attorneys, and after hearing additional evidence without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial
53 of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the sixteenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

Now come again the parties, by their attorneys, and after hearing additional evidence without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the seventeenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in

said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

54 Now come the parties again, by their attorneys, and after hearing additional evidence without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the eighteenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

Now come again the parties, by their attorneys, and after hearing the concluding evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until a future day.

Afterwards, to wit, on the twenty-second day of *of* July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

55 CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

Now come again the parties, by their attorneys, and after hearing a part of the arguments of counsel upon the issue herein, the hour of adjournment having arrived, it is ordered that the further trial of the case be postponed until to-morrow morning.

Afterwards, to wit, on the twenty-eighth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

Now come again the parties, by their attorneys, and after further hearing a part of the arguments of counsel upon the issue herein, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

56 Afterwards, to wit, on the twenty-ninth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

Now again come the parties, by their attorneys, and after further hearing a part of the arguments of counsel upon the issue herein, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the thirtieth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

57 Now again come the parties, by their attorneys, and the hearing of the arguments of counsel upon the issue herein is resumed, and, the same being concluded, *and* the court, not being fully advised in the premises, takes the same under advisement.

Afterwards, to wit, on the nineteenth day of January, 1886, came the plaintiff, by his attorneys, and filed in said clerk's office his motion to remand said cause to the State court in said entitled cause; which said motion is in the words and figures following, to wit:

57½ United States Circuit Court, Northern District of Illinois, *ss:*

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE *et al.* } In Ejectment.

Now comes the plaintiff and again respectfully moves the court to remand said cause back to the circuit court of Cook county, Illinois, for the following reasons, viz:

First. Because the plaintiff and principal defendants, namely, Jabez G. Smale and John I. Bennett, were at the date of commencement of this suit and still are all of them residents of the State of Illinois; that the other defendant, said Conrad N. Jordan, is and at the commencement of this suit was a resident of either Washington, D. C., or the State of New York.

Second. That there is not in said suit a separable controversy within the meaning of the laws of the United States in relation to "removal of causes."

Third. That there is no Federal question involved in said cause, within the meaning of the laws of the United States, justifying the removal and retention thereof by this honorable court.

WM. PRESCOTT,
Att'y for Plaintiff.

Endorsed: Filed Jan'y 19, 1886. Wm. H. Bradley, clerk.

58 On the same day, to wit, on the nineteenth day of January, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
J. G. SMALE *et al.* } Ejectment.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the plaintiff to remand this cause, and after hearing a part of the arguments of the counsel it is ordered that the further hearing of said motion be postponed to a future day.

Afterwards, to wit, on the first day of February, 1886, came the plaintiff, by his attorneys, and filed in said clerk's office his motion to amend his declaration in said entitled cause; which said motion is in the words and figures following, to wit:

59 U. S. Circuit Court, Northern District of Illinois.

In Re MITCHELL
vs.
SMALE.

And now comes the plaintiff, by his counsel, and moves the court

for leave to amend his declaration herein by dismissing and striking out the second additional count of the amended declaration filed in this cause Dec. 26, 1884.

And by inserting in the first additional count, on the 10th line thereof and immediately after the letters P. M., "according to the official plat of the survey thereof filed in the land office at Chicago, Illinois, prior to the year A. D. 1848."

(Endorsed:) Filed Feb'y 1, 1886. Wm. H. Bradley, cl'k.

60 On the same day, to wit, on the first day of February, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE *et al.* } Ejectment.

And now comes the plaintiff, by his attorney, and moves the court for leave to amend his declaration herein by dismissing and striking out the second additional count of the amended declaration filed in this cause on the twenty-sixth day of December, A. D. 1884, and by inserting in the first additional count, on the tenth line thereof and immediately after the letters P. M., "according to the official plat of the survey thereof filed in the land office at Chicago, Illinois, prior to the year A. D. 1848;" and the court thereupon grants said order.

61 On the same day, to wit, on the first day of February, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT, and CONRAD N. JORDAN. } Ejectment.

Now come the parties, by their attorneys, and the motion of the plaintiff to remand this cause to the circuit court of Cook county on the ground of want of jurisdiction in this court to proceed therein, and the cross-motion of the defendant, Conrad N. Jordan, to be substituted as sole defendant herein on the ground that he is the claimant in fee of the land in controversy and the landlord of the other defendants, coming on to be heard and determined, and the court, having considered the same, doth overrule both of said motions; to which ruling in refusing to remand the plaintiff, by

his attorney, now excepts, and to the ruling in refusing to substitute the defendant Jordan as sole defendant the defendant Jordan, by his attorney, now excepts.

62 On the same day, to wit, on the first day of February, 1886, there was filed in said clerk's office the special findings of the court in said entitled cause; which said special findings are in the words and figures following, to wit:

63 U. S. Circuit Court, Northern District of Illinois.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE *et al.* } Ejectment.

This cause having been submitted to the court for trial without the intervention of a jury by stipulation in writing, and the same having been brought on for trial, and the court, having heard all the evidence adduced and the arguments of counsel and now being fully advised in the premises, doth specially find the following facts:

First. That in the years 1834 and 1835 the United States caused to be surveyed the fractional township 37 north, range 15 east, of the third principal meridian, in the State of Illinois, and that said lands are situate in the county of Cook and State of Illinois.

That there is embraced partly within said fractional township (the other part lying within the State of Indiana) a body of water, denominated by the persons who made said survey "navigable lake," and that the paper marked Plaintiff's Exhibit "B" is a copy of the original official plat of the survey of said fractional township.

(Here follows plat marked p. 64.)

65 E. J. E.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March 8th*, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed tracing of the plat of township 37 north, range 15 east, 3rd principal meridian, Illinois, is a true and literal exemplification of the official plat of said township formerly of record in the United States land office at Chicago, Illinois, subsequently of record in the United States land office at Springfield, Illinois, and now of record in the General Land Office.

In testimony whereof I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

66 That in making said survey said body of water was "meandered;" that the field-notes showing such meander are as follows:

Meanders of lake margin through sections 19 & 20, township 37 north, range 15 east, 3rd principal meridian.

Thence from said corner to fractional sections 19 & 30 along southwestern margin of lake, along fractional section 19, township 37 north, range 15 east, of the 3rd principal meridian, as follows, viz:

N. 20° E. 15.00 chains.
N. 25° E. 15.00 "
N. 28¾ E. 35.10 to the corner to sections 19, 20, township 37 north, range 15 east; land, 1st 15.00 chains, 1st-rate soil, well timbered with white, yellow, and burr oak, hickory, lynn, &c., undergrowth hazle & briars.

* * * Thence from said corner to fractional sections 19, 20 along the northern margin of lake, along fractional section 20, township 37 north, range 15 east, of the 3rd principal meridian, as follows, viz:

N. 85° E. 10.00 chains.
S. 70° E. 10.00 "
S. 55° E. 10.00 "
S. 20° E. 15.00 "
S. 80° E. 10.00 "
S. 60° E. 14.00 "
S. 46° E. 11.60 chains.

67 S. 41° E. 2.00 chains to the temporary post set by me on the line between Indiana & Illinois at the intersection of said line with the lake. Land all marsh; water from 6 inches to 3½ feet deep.

June 17th, 1834.

Resurvey of the Meanders of Lake Through Section 20, *T.* 37, *R.* 15 *E.*

Commenced at the corner of the fractional sections 19 & 20, township 37 north, range 15 east; thence with the meanders of the northerly margin of the lake along fractional section 20, township 37 north, range 15 east, of the 3rd principal meridian, as follows, viz:

N. 85° E. 10.00 chains.
S. 70° E. 10.00.
S. 55° E. 10.00.
S. 20° E. 15.00.
S. 80° E. 10.00.
S. 60° E. 14.00.
S. 46° E. 11.60.
S. 41° E. 2.00 to the State line between Indiana & Illinois; 60.25 chains south of 156th mile corner at said intersection set post for corner to fractional section 20, township 37 north, range 15 east, of the third principal meridian. I found the water here too deep to raise a mound.

March 5, 1835.

JOHN A. CLARK.

68 AUDITOR'S OFFICE, ILLINOIS,
SPRINGFIELD, *February 16th*, 1884.

I, Charles P. Swigert, auditor of public accounts of the State of

Illinois, do hereby certify that the foregoing and annexed instrument is a true, full, and correct copy of the meanders of lake margin through sections 19 & 20, township 37 north, range 15 E., 3rd P. M., as the same appear in vol. 426, Field-notes "Ills. Surveys," at pages 565 & 613, now on file in and forming part of the records of this office.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, the day and year first above written.

[Seal of Auditor's Office, Ill.]

CHAS. P. SWIGERT.

69 Second. That the remote grantor of the plaintiff, Horatio B. De Witt, entered and purchased from the United States the tract of land embraced in said survey and shown upon said copy of plat as number 27185; and that afterwards and on the first day of March, A. D. 1850, the proper officers executed and issued to said Horatio B. De Witt a patent for said land in the usual form, in and by which the land so purchased is described as follows, to wit: "The southwest fractional quarter of fractional section twenty (20), in township thirty-seven (37), of range fifteen (15), in the district of lands subject to sale at Chicago, Illinois, containing four acres and fifty-three hundredths of an acre according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said "Horatio B. De Witt."

Third. That at the commencement of this suit the plaintiff, through mesne conveyances, had acquired and held the title in fee simple to the lands so conveyed by the United States to said Horatio B. De Witt under and by virtue of said patent.

That from the main land north of the east and west half section line of said section 20, running across said fractional southwest quarter of section 20, as patented, there is a ridge or elevation of land extending in a southwesterly direction; said ridge or
70 strip of land thus projecting southerly as aforesaid being of varying width and elevation, and timbered with oak, hickory, elm, ash, poplar, linden, and hackberry, three feet in diameter and under; the width of said ridge, limiting it to dry land at ordinary stage of water, being over 28 rods at the north and of varying width, being in some places slightly wider and at some narrower, extending to a natural depression about 150 rods south of said half-section line, said depression being about one chain wide, through which the waters flow at a high stage.

That said ridge between said meandered line and said depression contains at least twenty-five acres of dry land.

Fourth. That from thence south the general character of said ridge is the same, but slightly narrower and lower, a distance of about 80 rods, at the last-named point said ridge disappearing, and from there to a point south about 80 or 90 rods the bed & growth are of the same general character as the bed and growth along the margin of the lake, and on either side of the ridge reeds

and coarse grass growing in the water, and there being nothing but such growth to obstruct the flow of water from one side to the other, the depth at this point being sufficient at high water to enable skiffs and small boats to be rowed through from one side to the other, the water west having for many years been known as
71 Hyde Lake in ordinary speech, while that to the east has been currently known as Wolf Lake, said space or distance last described being marsh land at low water; that at the south limit of the space last described is a small body of land, known as Elm Island or Fogli's Place, of the extent of 1½ or 2 acres, upon which timber grows of the same character as that on said ridge; to the south of which for about 50 rods there is water at high stages and marsh at medium stages, at which point or distance the ridge appears again as dry land about 30 rods a little east of north from the north point of the meander line of the point of land comprising fractional section 29, &c.; that upon either side of the dry land of said ridge and in the space above described, south of Elm Island, the vegetation assumes a marshy appearance, weeds and coarse grass growing in the water of uniform character and extending in width 20 to 25 rods east and west.

That at the time said meandered line was run there were growing along and near the course thereof numerous large trees of different varieties on either side thereof, and that the elevation of the ridge at the meander line averaged about 4 feet above the level of the water at the time said meander line was run; that the physical conditions of the land and water are substantially what they were at the time of the original survey, and that said lake or lakes are non-
72 navigable waters; that the south line of said section 20, if full and projected through the water, would intersect the lower end of the ridge about 80 rods north of its southwest extremity.

Fifth. At the time of said Government survey there was a natural outlet for said lake or lakes towards the northeast into Lake Michigan through Wolf river, said river being about 1½ miles long and from 5 to 14 feet in depth; but such outlet was and has continued to be subject to interruption by the formation of a sand bar across the mouth thereof upon the shore of Lake Michigan. There was also an outlet from the westerly portion of said lake or lakes into the Calumet river, shown on said plat as Little Kalamick, said outlet into the Calumet river running in a westerly direction through the fractional north ½ of said section 30 to its connection with said Calumet river.

Sixth. The level of water in said lake or lakes is subject to fluctuations alike from the operation of the change of the level of Lake Michigan from storms, winds, &c., and also from the operation of rains, thaws, evaporation, &c.; but said lake or lakes is or are occupied by permanent water, and substantially the entire bottom thereof is below the mean level of Lake Michigan, and the greater portion of it is below extreme low water in said Lake Michigan,
73 so that said lake or lakes never become entirely dry, nor has any considerable portion thereof within its margin, as shown

by the said Government plat, ever been fit for cultivation, except as to said Elm Island and said ridge hereinabove described.

Seventh. That at times of high water, however produced, the water in said lake or lakes extends to and beyond the limits that it occupied at the time of said Government survey; that a level of Lake Michigan has been adopted in all surveys in Cook county, called datum; that the extreme rise and fall of Lake Michigan is from 5 feet above datum to one foot below datum; that the average level of water in Lake Michigan is about 1.8 feet above datum; that the level of water in said lake or lakes, when the same reaches the level existing at the time of the Government survey of 1834 and 1835, is 2.2 feet above datum and 4 feet above the average level of Lake Michigan.

Eighth. That the lakes and lands not embraced in the original survey—that is to say, all the lands, swamp as well as those covered by water, including the ridge, which are outside the meandered line run around said lake or lakes—the Commissioner of the General Land Office caused to be surveyed in 1874; that after such survey was made the United States, by its proper officers, sold to Alice
74 A. Condit the west half of the southwest quarter, the south half of the east half of the southwest quarter, and lot 2 of the southwest quarter, of fractional section 20, T. 37 N., R. 15 E., of this P. M., and issued to said Alice A. Condit patents in the usual form for said lands, and that the defendant, Conrad N. Jordan, is the owner, by mesne conveyances, of the lands so patented to said Condit; that Horatio B. De Witt, owner of the fractional S. W. ¼ of fractional section 20 in the original survey, contested before the proper officers of the Land Department the right of the United States to sell and convey title to said lands under said second survey, which contest was decided against the said De Witt by the Secretary of the Interior on appeal and in favor of the right of the United States to sell said lands under said survey.

Ninth. That said meandered line as it was originally run across said ridge from a point one chain east of the meander corner on the west and as is now adopted by the court as a line of boundary is entirely above the water except where said line intersects the east line of the fractional quarter section, to which point the water of Wolf Lake may possibly reach at high stages, and that — ordinary stages the waters approach to within four or five chains of said point.
75 That as a matter of fact the value of the lands sought to be recovered by the plaintiff herein and described in plaintiff's declaration, but for which the court refuses him judgment, exceeds the sum of $5,000.

Tenth. That the plaintiff's lines of boundary are the east line of the fractional southwest quarter of fractional section 20, township 37 north, range 15 east, of the 3rd principal meridian, on the east; the north line of said fractional southwest quarter of fractional section 20 on the north, and the meander line as originally surveyed and run across and upon said fractional southwest quarter of said fractional section 20 upon the south and west, and that the same contains four acres and fifty-three hundredths of an acre; and as to

said lands so lying within said boundaries the court finds the defendants guilty of unlawfully withholding the possession thereof from the plaintiff, and as to any and all and every the other lands claimed or demanded by the plaintiff by his pleadings herein the court finds the defendants not guilty; to all which plaintiff, by his counsel, excepts.

WALTER Q. GRESHAM,
Circuit Judge.

(Endorsed:) Filed Feb'y 1, 1886. Wm. H. Bradley, cl'k.

76 On the same day, to wit, on the first day of February, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Judgment.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT, and CONRAD N. JORDAN. } Ejectment.

Now come the parties, by their attorneys, and the court, having considered and being now fully advised upon the matters herein, upon the merits finds the defendants guilty of unlawfully withholding from the possession of the plaintiff the following-described lands, mentioned and described in the plaintiff's declaration, to wit: The southwest fractional quarter of fractional section twenty (20), in township thirty-seven (37) north, range fifteen (15), in the county of Cook and State of Illinois, as patented by the United States to Horatio B. De Witt under patent dated March first, 1850, and containing four acres and fifty-three hundredths of an acre.

The court further finds that the plaintiff has established title in fee simple to said lands in the plaintiff and assesses his damages at one cent, and that the boundary of said described lands does
77 not extend beyond the meander line of the original survey thereof by the United States. As to all the rest and residue of the lands and tenements described in the plaintiff's declaration the court finds the defendants not guilty.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of and from the defendants the possession of the said first-described lands according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor, and that the plaintiff also have and recover of said defendants the said sum of one cent, his damages, together with his costs in this behalf expended, amounting to — dollars and — cents, and that he have execution therefor.

78 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the Circuit Court of said District. December Term, 1885.

JABEZ G. SMALE *et al.*
ats.
CHARLES H. MITCHELL. } In Ejectment.

Be it remembered that on the trial of this cause in this term the defendants, by their counsel, presented and offered to introduce in evidence in said cause on their behalf a certain map or plat purporting to show (among other things) the courses and location of said meander line; to the introduction of which the plaintiff, by his counsel, then and there objected upon the ground that it is incompetent to prove or show any meander line other than the border waters of the lake and that it is otherwise improper, immaterial, and incompetent; but the court overruled the objection and permitted the introduction thereof in evidence in said cause,
79 which was done and marked Defendants' Exhibit 4, and is in the words and figures following, to wit:

(Here follows diagram marked page 80.)

81 To which ruling and decision of the court in permitting the introduction of said map or plat the plaintiff, by his counsel, then and there excepted.

And also that on the trial of said cause there were produced and sworn to testify as witnesses in said cause, upon the part of the defendants, Sylvester N. Howard, Charles B. Voday, and Charles I. Vilein, and, being each and respectively duly sworn, testified as follows:

The said SYLVESTER N. HOWARD:

My name is Sylvester N. Howard. I am a surveyor. In 1884 I was a member of the firm of Greely, Carlson and Company, surveyors.

Thereupon the defendants' counsel asked the following questions:

Question. State, Mr. Howard, whether you at any time ran out the meander line about "Hyde Lake," and especially on the west side of said lake, on sections 19 and 30, and between Hyde and "Wolf Lakes" on section 20.

Answer. Yes, sir; I have.

Question. Did you locate that meander line?

Answer. I did.

Question. Who accompanied and assisted you?

Answer. One of my assistants was Mr. Voday, the witness here.

Question. State what, if any, monuments or marks you placed

on the sections commencing on the half-section line of 30, running around to the half-section line of 19.

82 Answer. There were stakes placed at all the angles of the meander line.

Question. Did your assistants see those stakes placed?

Answer. Yes, sir.

Question. How was it on the southwest quarter of section 20?

Answer. There were stakes placed there, with possibly one exception.

Question. I enquire particularly as to the southeast corner of the southwest frac'l quarter of section 20—a four acre and a half piece, approximately.

Answer. There was a stake placed—a cedar post—$14\frac{6}{10}$ feet west of the north and south quarter lines and $375\frac{6}{10}$ feet south of the east and west quarter line.

Question. Have you a transcript or plat of your survey?

Answer. I have had a sketch from which the plat (Defendants' Exhibit No. 4) was made that shows a stake 14 feet & $\frac{6}{10}$ west of the north and south quarter lines and 375 feet and $\frac{6}{10}$ south of the east and west quarter line.

Question. Don't it show how far north or south of the meander line that would be?

Answer. It does not.

Question. What is your recollection or memory about that distance?

Answer. That I could not state, because the angles of the meander line would not come to the quarter line. I should say,

83 approximately, that it was within 50 feet of the meander line.

By counsel for plaintiff, on cross-examination:

Question. How did you find this meander line, as you call it, and did you run the line yourself personally?

Answer. Yes, sir.

Question. How did you find it?

Answer. How do you mean?

By the COURT:

Question. How did you locate it?

Answer. By latitudes and departures.

By plaintiff's counsel:

Question. Did you find any monuments fixed around on this line, indicating the points to which it was originally run?

Answer. There was a stake which, I suppose, was intended for this at the east line of section 19.

Question. Did you find any posts at the intersection of any of the angles around the line anywhere except at the section lines?

Answer. There was one at this corner, what was intended to be that corner.

Question. That is another section line, is it not?

Answer. That is the section line between 19 and 30.

Question. Under whose direction did you fix these posts that you say you fixed?

Answer. Under the direction of Mr. Bennett.

Question. Who were present with you in making this survey, so far as it relates to section 20?

84 Answer. My assistants and Mr. Bennett was on the grounds, but not along with us all the time.

Question. It was under his direction that you ran the meander line and fixed it?

Answer. Yes, sir.

Question. There were trees growing along the course of the meander line on the S. W. ¼ of section 20, were there not?

Answer. Yes, sir.

Question. Did you find any marks on the trees whatever indicating these angles?

Answer. I did not.

Question. Did you make the map or plat Defendants' Exhibit 4?

Answer. I did not make the map or plat. I don't know anything about the lines on the plat; I only state with reference to the lines on the ground.

By Mr. BENNETT, for def't-:

Question. Has Mr. Greely, your partner, had experience in matters of this kind?

Answer. He is an old surveyor.

Question. Was any of this work done in the office in connection with the Government notes or otherwise?

Answer. Well, it was all talked over with him and the latitudes and departures were all calculated by him. He assisted me in the mental work. He calculated the latitudes and departures for these courses in the office from copies of the Government notes.

85 Question. Did you find the section corners of 31 and 32?

Answer. Yes, sir.

Question. State what you found—what points you found—to identify and confirm you that you were right in reference to the meander line.

Answer. You mean what old monuments I found?

Question. Yes, sir; anywhere in the meander.

Answer. I think there were no old monuments at all at this corner except that I put there myself. The corners of sec. 31, 32, 29, & 30 I fixed, and placed a stone there, and this meander corner was fixed with reference to that.

And the said CHARLES B. VODAY testified as follows:

By counsel for defendant-:

Question. State whether you ever at any time in 1884 assisted Mr. Howard in locating the meander line at "Wolf Lake."

Answer. Yes; I worked all the time with Mr. Howard on the whole survey.

Question. Were you with him when he located any points, drove any stakes, or fixed any monuments in that work?

The COURT: State if you were present at the time this line was run by Mr. Howard—where you planted any stakes, if you planted such stakes.

Answer. I think we put stakes on the north—made angles on the meander.

By defendants' counsel:

86 Question. Did you show to Mr. Vilein any of those stakes that Mr. Howard placed on the line which he ran?

Answer. Yes, sir; I did.

By counsel for plaintiff:

Question. What were you doing in that survey?

Answer. Chaining.

Question. You ran in the direction he told you to and stuck a stake where he told you to?

Answer. Yes, sir.

Question. You don't know anything about where the meander line of that survey was actually located, do you?

Answer. No, sir.

Question. You simply ran the line under his direction?

Answer. Yes, sir.

And the said CHARLES J. VILEIN testified as follows:

By defendants' counsel:

Question. What is your occupation?

Answer. I am a surveyor.

Question. Are you acquainted with Hyde Lake and its surroundings?

Answer. Yes, sir.

Question. Has Mr. Voday (the witness here) ever pointed out to you and you put in stakes in what purported to be the meander line located by Mr. Howard?

Answer. Yes, sir.

Question. Where are they?

87 Answer. One was at Smith's house (on the west side of the lake) and the other on the ridge.

Question. When were you there taking elevations?

Answer. In September, 1884.

Question. Are you acquainted with the northeast part of the southwest quarter of section 20?

Answer. Yes, sir.

Question. Did you at any time put your levels over what was shown you as the meander line on the south line of that tract?

Answer. Yes, sir.

Question. Were you shown a stake near that meander line near the half-section line?

Answer. No, sir; I was not shown any stake.

Question. Was there anything shown you there to indicate the meander line?

Answer. There was a cedar post there at the east end of that line. A portion of the line was shown to me, and I afterwards found a brick that was placed there by Mr. Bennett, which agreed with the distance of the line.

Question. Did you have field-notes with you and compare that?

Answer. Yes, sir.

Question. Did it correspond?

Answer. Yes, sir.

Question. Did you take levels over that land?

Answer. Yes, sir.

Question. Did you make notes and have you compared the figures placed on this map (Def'ts' Exhibit 4) with your notes and are they correct?

88 Answer. Yes, sir; they are correct.

Question. You mean you had the original survey field-notes of the Government?

Answer. Well, I had notes; I believe they were Mr. Greely's notes, and I also had certain Government notes before that.

By counsel for plaintiff:

Question. In regard to this meander line, as you call it, you say you ran that (as I understand you) and found a brick somewhere. Can you point out on this plat (Def'ts' Exhibit 4) where it was found?

Answer. Yes, sir.

Question. Where was it?

Answer. Right here (indicating).

Question. Who placed the brick there.

Answer. When I was along Mr. Bennett put the brick there or told me to put a brick there. It laid on the snow at the time Mr. Howard surveyed at the point.

To all which questions so asked of the said witness, each and respectively, by the counsel for defendant and the respective answers thereto the plaintiff, by his counsel, then and there objected upon the grounds that such proposed evidence is incompetent, immaterial, irrelevant, and otherwise improper; but the court overruled the objection and permitted the witness to testify as aforesaid; to which ruling and decision of the court in permitting said questions

89 so respectively to be asked and answered as aforesaid the plaintiff, by his counsel, then and there excepted.

And also that defendants, by their counsel, offered in evidence another plat or map purporting to show, among other things, the relative possession of the water of the lake to the meander line in controversy and the topography and appearance of the surrounding lands and water at the date of the survey upon which the same was constructed, in the month of January, 1883; and also, in connection with said plat, the defendants offered to introduce John A. Cole, a surveyor and civil engineer who made the survey upon which said plat or map was constructed, and other witnesses for the purpose of

proving the correctness of said plat in the respects above stated at the date of said survey; to the introduction of which said map or plat and the said witnesses the plaintiff, by his counsel, then and there objected upon the ground that the same is incompetent, irrelevant, immaterial, and otherwise improper evidence in said cause; but the court overruled the objection and permitted the introduction of said map or plat in evidence in said cause, which was done and marked Defendants' Exhibit 4½ and is in the words and figures following:

(Here follows map marked page 90.)

91 And the court also overruled the objection so made by counsel for plaintiff to the introduction of said witness to testify touching the correctness of said plat at the time the survey was made upon which the same was constructed as aforesaid, and the said witnesses were permitted to and did testify to the effect that said plat did represent with substantial correctness the relative position and condition of the waters of the lake to the meander line in controversy and the topography and appearance of the surrounding lands and water at said date, except that Thomas Ganghan, one of said witnesses, stated, in answer to the following questions, as follows:

Question. Have you seen this map?

Answer. I saw it; was looking at the map. The south end is pretty well correct, but the north end is a little more rounding.

Question. But excepting that it seems to you to be fairly accurate?

Answer. Yes, sir.

To which ruling and decision of the court in permitting the introduction of said witnesses to testify as aforesaid the plaintiff, by his counsel, then and there excepted.

92 And also that defendants, by their counsel, offered in evidence an exemplified copy of a certain plat or diagram purporting to be a diagram or plat of the survey of the bed of said lake (and embracing part of the land in controversy in this cause) made by authority of the General Land Office in the year 1874; to the introduction of which the plaintiff, by his counsel, then and there objected upon the ground that the same is immaterial, incompetent, and otherwise improper; but the court overruled the objection and permitted the introduction of said exemplified copy of said plat or diagram in evidence, which was done and marked Defendant-'Exhibit 5 and is in the words and figures following:

(Here follows diagram marked page 93.)

94 E. B. DEPARTMENT OF THE INTERIOR, J. S. W.
GENERAL LAND OFFICE, S. J. D.
WASHINGTON, D. C., *Oct.* 27, 1882.

I, L. Harrison, acting Commissioner of the General Land Office,

do hereby certify that the annexed copy of the plat of the original survey of township 37 north, range 15 east, 3d P. M., Illinois, embracing the plat of the survey by Alex. Wolcott, in September, 1874, of a meandered lake in certain sections in said township, is a true and literal exempli-cation of the original plat on file in this office.

In testimony whereof I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

L. HARRISON,
Acting Commissioner of General Land Office.

95 To which ruling and decision of the court in permitting the introduction of said diagram or plat in evidenced the plaintiff, by his counsel, then and there excepted.

And also that on the trial of said cause defendants, by their counsel, offerred in evidence a certain patent issued by authority of the General Land Office under and by virtue of the survey aforesaid to one Alice A. Condit, bearing date July 2, 1881, conveying to said Condit a portion of the land in controversy; also a deed of conveyance by said Condit to Joseph P. Ord, and also a deed from said Ord to said Conrad N. Jordan, embracing the same lands described in said patent; to the introduction of all which the plaintiff, by his counsel, then and there objected upon the ground that the same are each and respectively incompetent, immaterial, irrelevant, and otherwise improper as evidence in this cause; but the court overruled the objection and permitted the introduction thereof, each and respectively, in evidence herein, which was done and marked Defendants' Exhibits 6, 7, & 8, respectively, the same being in the words and figures following:

96 DEF'TS' EX. 6.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 3, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of patent in favor of Alice A. Condit, founded on Washington, D. C., cash certificate No. 29743, Springfield series, is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my [SEAL.] name and cause- the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

97 *Springfield Series.*

Certificate No. 29743.

The United States of America to all to whom these presents shall come, Greeting:

Whereas Alice A. Condit, of Cook county, Illinois, has deposited in the General Land Office of the United States a certificate of the acting Commissioner and *ex officio* register of the Land Office at Washington, District of Columbia, whereby it appears that full payment has been made by the said Alice A. Condit, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for the west half of the southwest quarter, the southeast quarter of the southwest quarter, and the lot numbered two of the southwest quarter of section twenty, in township thirty-seven north of range fifteen east of the third principal meridian, in Illinois, containing one hundred and fifty-five acres and forty-seven hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Alice A. Condit:

98 Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Alice A. Condit and to her heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Alice A. Condit and to her heirs and assigns forever.

In testimony whereof I, James A. Garfield, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the second day of July, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and fifth.

By the President:

[SEAL.] JAMES A. GARFIELD,
By WM. H. CROOK, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 58, page 45.

99 DEF'TS' EX. 7.

This indenture, made this seventh day of July, in the year of our Lord one thousand eight hundred and eighty-one, by and between

Alice A. Condit, of Muncie, in the State of Indiana, who is an unmarried woman, of the first part, and Joseph P. Ord, of Princeton, in the State of New Jersey, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of eight thousand dollars, and other good and valuable consideration, in lawful money of the United States, to her in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and doth by these presents grant, bargain, sell, alien, enfeoff, release, and convey, unto the said party of the second part, his heirs and assigns forever, the following-described real estate, situate in the county of Cook and State of Illinois, to wit: The west half (½) of the southwest quarter (¼) the south half (½) of the east half of said quarter; also lot number two (2) of said southwest quarter of section number twenty (20), in township thirty-seven (37) north, range fifteen (15) east, of the 3d P. M., containing one hundred and fifty-five acres, more or less, and being the same lands acquired by the party of the first part from the Government of the United States, together with all the improvements, ways, easements, rights,
100 privileges, appurtenances, and hereditaments to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, either at law or in equity, of the said party of the first part of, in, to, or out of the said pieces or parcels of land and premises:

To have and to hold the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his sole use, benefit, and behoof forever.

In testimony whereof the said party of the first part *have* hereunto set *their* hand and seal on the day and year first hereinbefore written. ALICE A. CONDIT. [SEAL.]

Signed, sealed, and delivered in the presence of—
I. S. BUCKLES.
C. B. TEMPLER.

STATE OF INDIANA, *Delaware County*, } ss:

I, Clayton B. Templer, a notary public in and for said county, do hereby certify that Alice A. Condit, who is to me well known to be the same person who signed and whose signature is annexed to the foregoing deed, and who is also known to me to be an unmarried woman, appeared before me this day in person and acknowledged the execution of said deed to be her act and deed for the use and purpose therein expressed.

101 Given under my hand and seal this 7th day of July, A. D. 1881. CLAYTON B. TEMPLER,
Notary Public.

[Notary Public Seal, Delaware Co., Ind.]

No. 339257. Recorded Jul- 25, 1881, at 1 p. m.
JAS. W. BROCKWAY, *Recorder.*

STATE OF ILLINOIS, } ss:
County of Cook, }

I, James W. Brockway, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the 25th day of July, A. D. 1881, as document No. 339257, and recorded in Book 1091 of Records, at page 241.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Chicago, this twelfth day of February, A. D. 1883.

[Seal Recorder of Deeds, Cook County, Illinois.]

JAS. W. BROCKWAY, *Recorder.*

102 *Certificate.*

STATE OF INDIANA, } ss:
Office of the Secretary of State, }

I, W. R. Myers, secretary of state of the State of Indiana, do hereby certify that Clayton B. Templer, before whom the original acknowledgement of which the foregoing purports to be a true copy —, was at the date of acknowledgement thereof a duly commissioned and qualified and authorized notary public to take acknowledgements of deeds within and for the county of Delaware and State of Indiana.

In witness whereof I have hereunto set my hand and affixed the seal of the State of Indiana, at the city of Indianapolis, this 25 day of February, A. D. 1883.

[SEAL.] W. R. MYERS,
Secretary of State.

103 STATE OF INDIANA, } ss:
Delaware County, }

I, Asbuy L. Kerwood, clerk of the Delaware circuit court in and for said county and State, the said court being a court of record, do hereby certify that Clayton B. Templer, Esq., before whom the original acknowledgement of which the foregoing purports to be a true copy was made, was at the date thereof a notary public for said county, duly commissioned and qualified and duly authorized to take acknowledgements of deeds in said State.

I further certify that the original deed of which the foregoing purports to be a true copy is made, executed, and acknowledged in conformity to the laws of the State of Indiana as they existed at the date of said deed and acknowledgement and as they now exist.

In testimony whereof I hereunto affix my name and the seal of the Delaware circuit court, at the city of Muncie, this 24th day of February, A. D. 1883.

[SEAL.] ASBURY L. KERWOOD, *Clerk.*

104 DEF'TS' EX. 8.

The grantors, John I. Bennett, of the city of Chicago, in the State

of Illinois, and Maria E. Bennett, his wife; Joseph P. Ord, of Princeton, in the State of New Jersey, unmarried; Henry M. Alexander, of the city of New York, and Susan M., his wife; and Henry Day, of the said city of New York, and ——, his wife, for the consideration of one dollar, lawful money of the United States of America, convey and quitclaim unto Conrad N. Jordan, of the city of New York aforesaid, all interest in the following-described real estate, to wit: The south half (½) of the northwest quarter (¼) and the north half (½) of the southwest quarter (¼) of section number twenty-nine (29), the west half (½) of the southwest quarter (¼), the southeast quarter (¼) of the southwest quarter (¼), and lot numbered two (2) of the southwest quarter (¼) of section twenty (20), and lot numbered three (3) of the northwest quarter (¼) of section numbered twenty (20), and lot numbered one (1) of the northeast quarter (¼) of section nineteen (19), all in township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, in the county of Cook and State of Illinois, and lots numbered two (2) and three (3) of the southeast quarter (¼) of section nineteen (19), in the township, county, and State aforesaid; the east half (½) of the northeast quarter (¼) of section thirty (30), in the township, county, and State aforesaid; the northeast quarter (¼) of the southeast quarter (¼) and lot three (3) of the southeast quarter (¼) of section thirty (30), and lot one (1) of the northeast quarter (¼) of section thirty-one
105 (31), in the same township and county aforesaid, all of the said tract being in township thirty-seven (37) north, range fifteen (15) east, of the third (3rd) P. M., in the county of Cook and State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State of Illinois; but it is expressly understood and agreed by and between the parties hereto that nothing in this deed contained shall be held to merge in the title the whole or any part of a certain mortgage executed by said John I. Bennett, of the first part, and Joseph P. Ord, of the second part, to the said Henry M. Alexander, Henry Day, and Conrad N. Jordan, of the third part, dated the twenty-first day of July, 1881.

Dated fourth day of October, 1882.

J. P. ORD. [SEAL.]

STATE OF NEW YORK, }
City and County of New York, } ss:

On this fourth day of October, A. D. 1882, before me, Charles Edgar Mills, a commissioner for the State of Illinois in and for the State of New York residing in said city of New York, personally appeared Joseph P. Ord, who is personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he had signed, sealed, and delivered the said instrument as his free act and deed, for the uses and purposes therein expressed, including the release and waiver of the right of homestead under the laws of the State of Illinois.

106 In witness whereof I have hereunto set my hand and affixed my official seal this fourth day of October, A. D. 1882.

CHARLES EDGAR MILLS,
Commissioner for Illinois in New York,
115 & 117 *Broadway, N. Y. City.*

CHARLES EDGAR MILLS,
A Commissioner for the State of Illinois, State & City of New York.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, James W. Brockway, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the 18th day of December, A. D. 1882, as document No. 439,053 and recorded in Book 1259 of Records, at page 604.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed my official seal, at Chicago, this sixth day of March, A. D. 1883.

JAS. W. BROCKWAY, *Recorder.*

107 To which ruling and decision of the court in permitting the introduction of the patent and deeds aforesaid the plaintiff, by his counsel, then and there excepted.

And the defendants also offered in evidence on the trial of said cause exemplified copies of a decision of the Commissioner of the General Land Office "In the matter of the claims of the Illinois Central Railroad Company, the State of Illinois, the County of Cook, Gertrude H. Hardin, Horatio B. De Witt, and sundry other persons for lands in township 37 N., R. 15 east, Illinois, known as the bed of Wolf Lake," and embracing part of the land in controversy, dated February 12, 1878, and the decisions of the Secretary of the Interior upon the appeal of Horatio B. De Witt and others in said matter of said Commissioner's decision of date February 12, 1878, as aforesaid, which decisions bear date May 4, 1880, Aug. 24, 1880, May 16, 1881, and April 28, 1881, respectively; to the introduction of which said decisions of and by said Commissioner and Secretary of the Interior, each and respectively, the plaintiff, by his counsel, then and there objected upon the ground that said decisions were and are, each and respectively, immaterial, incompetent, and otherwise improper; but the court overruled the objection and per-
108 mitted the introduction thereof in evidence in said cause; which was done, and marked Defendants' Exhibits 9, 10, 11, & 12 & 13, and are in the words and figures following:

109 DEF'TS' EX. 9.

DEPARTMENT OF THE INTERIOR, T. R. B.
GENERAL LAND OFFICE, J. D. S.
WASHINGTON, D. C., *Nov'r* 25, 188–.

I, N. C. McFarland, Commissioner of the General Land Office, do

hereby certify that the annexed copy of the decision of the Secretary of the Interior of May 4, 1880, in the matter of the claims to certain lands lying within the bed of Wolf Lake, in town. 37 N., range 15 E., 3rd P. M., Illinois, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 4, 1880.

SIR: I have considered the appeals of J. Peter Munhoven *et al.* from your decision of February 12, 1878, involving certain tracts of land in what is known as the bed of Wolf Lake, in township 37 N., range 15 E., of the 3rd principal meridian, Illinois.

110 A survey made in 1834 and 1835 represented a portion of the township embracing said tracts as a part of a navigable lake.

The waters of the lake having from some cause permanently receded, leaving within the unsurveyed area dry land fit for agricultural purposes, an application, dated August 19, 1874, based upon affidavits, was made to your office for a survey under *circulation* of July 13, 1874 (Copp's L. L., p. 765). Upon this application a survey was ordered, which was duly executed and approved by your predecessor December 31, 1874, copy of the plat of which was soon after filed in the local office at Springfield.

Since the approval the tracts thus surveyed have been recognized and treated as public land and claims have been initiated thereto in the usual manner under general laws, your decision upon the claims of the State of Illinois, the Illinois Central Railroad Company, and divers other parties who have not appealed is considered as conclusive, and those cases only in which appeals were filed will be considered. The tracts surveyed in 1834–'5 were disposed of long prior to the survey of 1874, and owners of tracts that abutted upon the meanders of the lake under the old survey now claim the newly surveyed tracts as riparian owners.

The parties thus claiming are H. B. De Witt and Gertrude Hardin, both of whom have appealed. You reject their claims on the ground that they "have been denied by the action of your office in

111 ordering and approving the survey of the lake bed, thus treating the land as belonging to the United States." It seems to me that no other decision can consistently be reached. To recognize riparian rights to these tracts would be equivalent to saying that the lands do not belong to the United States, and that the survey was a nullity. It is now too late for this Department to question the legality of the survey. It is an accomplished fact. It was ordered, begun, and fully executed under a former administration. Parties claiming the land under laws of the United States have proceeded with regard to their claims, relying upon its regularity and legality, and

they should be heard by this Department and have their claims disposed of as in other similar cases of claims to public land. Your predecessor decided to order the survey upon consideration of the application therefor, and it was ordered in pursuance of the regular practice of your office and of circular instructions for all surveys of that class of land. The ordering of the survey as well as the approval thereof involved a decision that the land belonged to the United States.

There is nothing to show that the order of approval was procured by fraud, or that either was the result of inadvertence or mistake. As no grounds are presented for setting aside the action of your predecessor or to show that the lands were not subject to public survey, in accordance with the rulings and practice of your office for a long series of years, the survey will not be disturbed, but will remain intact.

112 Your decision rejecting the riparian claims of De Witt and Hardin is therefore affirmed.

J. Peter Munhoven filed soldier's declaratory statement for lots 1, 2, and 3, of section 32, January 14, 1875, and made application to enter under the homestead laws at 9.35 a. m. of the same day. Additional homestead application in the name of William Brewer was filed for said tracts on the same day at 9 o'clock a. m. It appears from the testimony that Munhoven went upon the land September 8, 1874, and built a house, wherein he was residing at the date of trial. At the hearing F. A. Cleveland testified that the house was built of material purchased by him with money furnished by Mr. McDaid. You decided that this improvement was not of such a character as to give Munhoven any priority in equity, and that Brewer had the superior legal right to the land, and directed that his additional homestead application be received.

In this, I think, you erred. The house was an improvement upon the land and Munhoven resided in it, claiming it as his property. It was not claimed, as I understood it, by Cleveland or McDaid. In accordance with the rule announced in the decisions of this Department of July 12, 1879, in the case of Shadduck *v.* Hosmer and in the case of Lyons *v.* Stevens (Copp's L. O., vol. 6, p. 107), the better right was in Munhoven, and his entry should be admitted as of the date of the filing of his application and remain intact, subject to final proof, unless in the meantime it be declared upon due

113 proof to be invalid or to have been abandoned. Your decision in favor of Brewer is therefore reversed. Munhoven's application for a new trial, so far as it is based upon affidavits showing that he has resided upon the land since 1874 and cultivated the same every year since that time, and that he actually furnished the money to build his house thereon, need not be considered for reasons above stated.

But there is on file in this case an agreement, dated Sept. 23, 1875, signed by Charles D. Gilmore, of this city, and Munhoven, in which it is stated that, in consideration of the withdrawal by Gilmore of his claim, said Munhoven agrees to transfer and deed to Gilmore one undivided half of said tracts when-

ever he shall have obtained title thereto under his homestead application.

In his affidavit of May 24, 1879, in support of his application for a new trial, Munhoven states that his signature was obtained by fraud and circumvention; that he is not well versed in the English language, and that he did not know that he signed such a paper. He virtually repudiates the contract, and, as the records do not show that Gilmore had any claim to withdraw or that he ever withdrew any claim to the land, the contract is apparently without consideration; still, it raises a very strong suspicion of the invalidity of Munhoven's claim, and, as he desires an opportunity to explain the matter, you will order an investigation, giving Munhoven an opportunity to present testimony in the premises.

114 Joseph Könyvesy filed pre-emption declaratory statement February 8, 1875, claiming lots 2 and 3 and the N. E. ¼ of N. E. ¼ of section 30, alleging settlement in 1868, and that he had fenced said land on three sides and had used it for plowing, meadow, and pasturage since that time, and that he built a house on lot 2 in January, 1875, in which he was residing at the time of filing his declaratory statement.

He offered no proof at the trial, for the reason that the local officers failed to give him notice of the hearing for that purpose. You held that this pre-emption claim was neither properly presented nor followed up, and that it did not merit consideration, and thereupon you awarded the N. E. ¼ of N. E. ¼ and lot 3 to F. A. Cleveland, a pre-emption claimant, and lot 2 to John O. Medlock.

Könyvesy appealed from so much of your decision only as affected said lot 2.

I think you erred in rejecting Könyvesy's claim and awarding to Medlock.

In the first place, the township plat was filed January 9, 1875, and the declaratory statement of Konyvesy was therefore presented in time, and he was entitled to a hearing after due notice before any other disposition was made of the land. Again, if, as was alleged, Konyvesy was in possession of the land, with valuable improvements thereon, and was actually residing there, according to the well-settled rule of this Department the lot was not subject to the application of Medlock.

115 Your decision in this matter, to the extent appealed from, is reversed, with directions to order a hearing between Konyvesy and Medlock upon due notice to both parties.

Lyman D. McDaid filed soldier's homestead application January 14, 1875, for the N. W. ¼ of section 29, and on March 14, 1877, submitted proof in support thereof.

You awarded the N. ½ of said quarter to F. C. Wilkerson and John White, additional homestead claimants, and the S. ½ to Sólomon Field, a pre-emptor. McDaid appealed from the decision to the extent only of the award to Field, and under date of September 15, 1879, his attorney, H. O. McDaid, Esq., withdrew the appeal. The rights of the appellant and appellee, therefore, must be considered as determined by your decision.

My attention is called to a contract entered into September 23, 1875, between Charles D. Gilmore, of this city, of the first part, and the said Lyman D. McDaid and H. O. McDaid, of Chicago, of the second part. This contract discloses an unlawful collusion between the parties to secure title to the N. W. ¼ of section 29. Gilmore agreed to withdraw all claim to the N. ½ of said quarter section and consent to the issuing of patent therefor to McDaid, and, in consideration whereof, the said McDaid agreed to co-operate with and aid Gilmore in securing title to the S. ½ of said quarter section, either through Gilmore's claim or the soldier's homestead application of McDaid, and that if title should be obtained thereto by McDaid he was to convey an undivided half thereof immediately to Gilmore.

116 Now, I understand that there were many conflicting claims asserted to the tracts surveyed as the bed of Wolf Lake, and that the land is deemed very valuable. Considering how few of these claims have been prosecuted by appeals from your decision, and in view of the fraudulent arrangements in two of the cases appealed, as shown by the contracts above referred to, while it is true that fraud should not be presumed in any case, I cannot divest my mind of a very strong impression that *they* may be other collusive arrangements than those referred to unknown to your office and this Department for securing title to said tracts or some of them, in accordance with which parties have desisted from further prosecution. To say the least, the acquiescence in the decisions by so many claimants to a body of very valuable land is something quite remarkable in the history of the practice of the Land Department. I am, therefore, of opinion that before the issuance of patents in any of these cases a thorough, searching investigation of the whole matter of the claims to this body of land should be had by a special agent.

The papers submitted by you with the said appeals are herewith returned.

Very respectfully, C. SCHURZ, *Secretary*.

The Commissioner of the General Land Office.

117 [Endorsed:] 1880. 31257. Interior Dep't. Secretary, May 4, 1880, returns papers in matter of appeal of J. Peter Munhoven *et al.* regarding lands in Wolf Lake, and is of opinion that an examination should be had. Copies sent to the various attorneys May 28 and June 2, 1880. 2–1514. Benton. May 5, 1880.

118 DEF'TS' EX. 10.

F. DEPARTMENT OF THE INTERIOR, T. R. B.
GENERAL LAND OFFICE, J. D. S.
WASHINGTON, D. C. *November* 25, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of the decision of the acting Secretary of the Interior of Aug. 24, 1880, dismissing the petition of Gertrude H. Hardin for a rehearing in the matter of her claim

to certain lands in T. 37 N., R. 15 E., 3d P. M., Ills., is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

119 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August 24th*, 1880.

SIR: I have had under consideration a petition of Gertrude H. Hardin for a rehearing in the matter of her claim as riparian owner to certain land in what is known as the bed of Wolf Lake, in township 37, range 15 east, in the State of Illinois, decided by this Department May 4, 1880.

The points raised and upon which a reversion of the decision in the matter is asked may be stated in a general way as follows:

First. That the survey of 1874 was without authority of law and should be set aside.

Second. That the Department has no jurisdiction to dispose of any lands in said township other than those returned by the surveys thereof executed in 1834 and 1835.

The same points were raised and argued upon the appeal from your decision of February 12, 1878, and were considered and passed upon by the decision aforesaid.

The petition, therefore, is simply a reargument of the case of Gertrude H. Hardin, and it presents no new or additional reasons why the action of your predecessor in ordering and approving the survey of 1874 should be now disturbed. The decision held in effect that the matter of ordering and approving of said survey was *res judicata*, and that no case had been made out under the well-
120 established rule to justify the present head of the Department in reopening or setting aside the action of your predecessor in the premises. On further consideration I see no reason for receding from the decision, but, on the other hand, I find additional grounds for adhering to it. I find from the records of your office that Mrs. Hardin had knowledge of the fact that the survey was being made and due notice of the approval thereof and of the filing of the plat in the local office at Springfield and took no appeal.

Considerable correspondence was had between Mr. I. N. Hardin, who appears as attorney-in-fact for Gertrude H. Hardin, and your office pending the survey. Mr. Hardin opposed the survey, claiming then, as he does now, as riparian owner.

On the 28th Nov., 1874, he was advised that the survey had been approved. On the 30th of December, 1874, he addressed a letter to your office, which the following reply thereto, under date of January 7, 1875, addressed to Mr. Hardin, at 238 So. Water St., Chicago, explains: "I am in receipt of your letter of the 30th ultimo, requesting to be informed what effect the approval of the survey of Wolf Lake has upon the subject of your former communica-

tions, viz., the question raised by you as to the navigability of the waters of said lake. You also inquire whether this office regards the lands from which the waters have receded as public lands.

In reply I have to inform you that conclusive evidence having been filed in this office showing the non-navigability of the waters of the bed of said lake, and the survey having been made and approved, the plat thereof, together with instructions to the register and receiver, has this day been forwarded to the local land office at Springfield, Illinois. The lands are regarded as public lands. (See copy of my circular of July 13, 1874, herewith enclosed.)"

121

Thus it appears that the petitioner had notice of the proceedings in the matter and of the decision and action of your predecessor therein and could have been fully heard by the head of this Department upon appeal, appeal in such matters being allowable. (Appeal of Caroline M. Forsyth, decided by this Department February 12, 1877, upon survey of lakes beds in town. 38 C. north, range 10 west, Indiana.)

The petition is dismissed, and you will so advise the parties in interest.

The petition and accompanying papers and the reply thereto of John I. Bennett, Esq., are herewith transmitted for filing in your office.

Very respectfully,

A. BELL,
Acting Secretary.

The Commissioner of the General Land Office.

122 [Endorsed:] 1880. 56722. Interior Department. Act'g Sec., Aug. 24, 1880, dismissed petition, with accompanying papers, of Gertrude H. Hardin for a rehearing in her case. 2–1514. Sept. 11, 1880. Copy sent to I. N. Hardin and J. I. Bennett. Benton. Papers received with this decision filed with case. Aug. 25, 1880. 459. F.

123 DEF'TS' EX. 11.

DEPARTMENT OF THE INTERIOR, T. R. B.
GENERAL LAND OFFICE, J. D. S.
WASHINGTON, D. C., *November* 25, 1882. 7.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of the decision of the acting Secretary of the Interior of May 16, 1881, rejecting the petition of I. N. Hardin for a rehearing in the matter of the claim of Gertrude H. Hardin to certain lands in town. 37 N., R. 15 E., 3d P. M., Ills., is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

N. C. McFARLAND,
Commissioner of General Land Office.

124 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May 16th*, 1881.

The Commissioner of the General Land Office.

SIR: On the 27th ultimo I. N. Hardin, Esq., through Hon. John A. Logan, filed an application for review of the decision of my predecessor of May 4, 1880, in the Wolf Lake case, involving tracts of land in township 37 N., R. 15 E., of the 3d principal meridian, in the State of Illinois. So far as said decision relates to the claim of Gertrude Hardin, that application was denied by me on the 28th ultimo. I forward herewith a copy of my decision rejecting the same.

Mr. Hardin has made still another application for a review of that decision, which application was received on the 11th instant.

The application filed in April was disposed of on its merits, notwithstanding Mr. Hardin had not complied with the rules of practice in the following particulars:

First. No notice of the application was served on opposing parties, as required by rule 76 (Rules of Practice, p. 12).

Second. It was not accompanied by the affidavit required by rule 78 (*ibid.*).

The application might have been rejected for the reasons above stated, but as it could not be allowed upon its merits it was deemed best to dispose of it as stated above.

125 The present application is subject to the same objections under the rules above cited, but, as under well-settled rules of administrative law I have not the authority to grant the application, I will not reject it on the ground alone of its irregularity, but will give my reasons why it could not be allowed if all the formalities and prerequisites of the Rules of Practice had been complied with.

The application under consideration presents nothing new and material to the Department, all the material matters alleged having been fully considered by my predecessor on the appeal from your decision of February 12, 1878, and in the decision rendered by him August 24, 1880, rejecting an application of Gertrude Hardin for a rehearing of the case.

The first three reasons why a review or rehearing should be granted are stated by Mrs. Hardin thus:

"(1.) Because the claim of Mrs. Hardin has never been considered, heard, or adjudicated.

"(2.) Because her claim has been denied without a hearing.

"(3.) Because her claim has been denied a hearing for the sole reason of an act of the General Land Office, which act is admitted to have been unlawful."

These objections involve but one point differently stated—that is, that Mrs. Hardin has never had her day in court. In the decision of August 24, 1880, above referred to, my predecessor considered this point and showed that Mrs. Hardin had notice of the survey of 1874 and an opportunity to make such objections thereto as she might be advised were proper, and could have appealed

126 from the approval of said survey. The approval of that that survey was necessarily made upon a final decision by the Commissioner of the whole matter then before him. The approval was the result and expression of that decision. That decision affected the claimed rights of Gertrude Hardin, and from it she could have appealed. The right of appeal was not exercised, and her rights were concluded, so far as this Department is concerned. The right of appeal has now expired and no appeal can be allowed. As to the statement that *to* the act of the Commissioner in approving said survey was illegal and is admitted to be so, I have to say that I know of no decision of your office or this Department in which such admission is made. On this point my predecessor, in the decision of May 4, 1880, said: "You reject their claims (Hardin's and De Witt's) on the ground that they have been denied by the action of your office in ordering and approving the survey of the lake bed, thus treating the land as belonging to the United States." It seems to me that no other decision can consistently be reached. To recognize riparian rights to these tracts would be equivalent to saying that the lands do not belong to the United States, and that the survey was a nullity. It is now too late for this Department to question the legality of the survey. It is an accomplished fact. It was ordered, begun, and fully executed under a former administration. * * *

"Your predecessor decided to order the survey upon consideration of the application therefor, and it was ordered in pursu-
127 ance of the regular practice of your office and of circular instructions for all surveys of that class of lands. The ordering of the survey, as well as the approval therefor, involved a decision that the land belonged to the United States. There is nothing to show that the order or approval was procured by fraud, or that either was the result of inadvertence or mistake. As no grounds are presented for setting aside the action of your predecessor or to show that the lands were not subject to public survey in accordance with the rulings and practice of your office for a long series of years, the survey will not be disturbed, but remain intact."

No further reply to the allegation that the survey of 1874 is admittedly illegal is necessary.

The next point in the application is stated as follows:

"(4.) Because the decision of the Commissioner of the General Land Office is contrary to the previous declarations of that officer."

The previous declarations referred to are alleged to be contained in a letter of Commissioner Drummond, under date of March 9, 1874, to John R. Lewis, which Mr. Hardin alleges is in the following language:

"In reply to yours of the 28th ultimo I have to state that the S. W. fr'l q'r of sec. 20, T. 37, R. 15 E., of 3 P. M., was entered by H. B. De Witt July 16, 1848, and patented to him March 1, 1850, and no additional survey has ever been made of the above tract, and if the area of the original survey, 4.53 acres, has increased by accre-
tions it enures to the original purchaser or his assignees." It is
128 claimed inferentially that this letter bound Mr. Drummond's

successor, and that as Mr. Hardin has recently discovered it, it is such newly discovered evidence as authorizes this Department to reopen the case under the rule announced in the decision of April 28, 1881. The first observation upon this point is that the discovery of new documentary evidence that might have been obtained in season will not authorize a new trial; so, where the newly discovered evidence was all of record in the court or in a public office and might have been found by reasonable search, it has been held that this furnished no reason for a new trial. (Hilliard on New Trials, 2d ed., p. 489, sec. 9; decision of this Department in the matter of the survey of the Chanvin grant, rendered March 2, 1881.)

Again, that letter referred to other land than that entered or claimed by Hardin. It was not a decision upon any case pending before the General Land Office, but was merely a letter addressed to a private individual in reply to one from him.

It was simply the opinion of the Commissioner as to the rights of riparian owners to accretions. There is, I believe, no sustained allegation that the lands surveyed as the bed of Wolf Lake are accretions as the term accretion is understood in law.

In my opinion the letter referred to would not have precluded the Commissioner of the General Land Office from approving the
129 survey of 1874 had it been called especially to his attention. Therefore whether he had knowledge of the letter, actually or constructively, when he approved said survey is an unimportant matter that requires no further inquiry here. To procure a new trial the evidence relied on should not only be newly discovered in the true legal sense, but it should be such as would have induced a different conclusion or as would compel a different decision on the new trial. There is, therefore, no new evidence presented to give me jurisdiction to overturn or reopen the deliberate decisions of my predecessor.

As to the allegations of error in my predecessor's decision, it is sufficient to say that there is no appeal from the decision of the head of a department to his successor in office. As to the allegation that the case is still before the Department, it is sufficient to say that the question as to whether or not the land claimed by Mrs. Hardin belongs to the United States is no longer before the Department, that being the very question decided by the approval of the survey, and which my predecessor, upon full consideration of the entire case, refused to reopen, and that my predecessor rejected in terms the claim of Mrs. Hardin. There may be other matters connected with the Wolf Lake case still pending, but the question of Mrs. Hardin's claim is not among them.

The applicant has her remedy in court for her alleged rights in the premises. If the survey was illegal and unauthorized, as alleged, the courts in a proper case can so declare, but in law
130 the matter is beyond the jurisdiction of this Department. The application for review is therefore rejected. The application filed on the 27th ultimo and the one hereby rejected are herewith forwarded for the files of your office. You will advise Mr. Hardin of this decision in the usual manner.

Very respectfully,

A. BELL,
Acting Secretary.

[Endorsed:] General Land Office. Rec'd May 17, 1881. Interior Department. Act'g Sec., May 16, 1881, refers papers and rejects application of I. N. Hardin for review of decision in Wolf Lake case. 2–1514. Copy sent to Hardin May 24, 1881.

131 DEF'TS' EX. 12.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, 23*d Nov.*, 1882.

I, H. M. Teller, Secretary of the Interior, hereby certify that the paper hereto attached is a true copy of the original as the same appears of record in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department to be affixed the day and year first above written.

[SEAL.] H. M. TELLER, *Secretary.*

132 DEPARTMENT OF THE INTERIOR,
WASHINGTON, 28*th April*, 1881.

I. N. Hardin, Esq., Aurora, Illinois.

SIR: I have received, through Senator John A. Logan, your letter of the 18th instant in relation to certain lands in town. 37 N., range 15, 3d principal meridian, Illinois.

After reciting the action of the General Land Office and of the Department in the matter you ask me to institute a careful inquiry into the facts and meanwhile to prevent the issuance of patents or any further acts to the detriment of your lawful rights.

I find that on the 4th May last my immediate predecessor, in an elaborate discussion of the question at issue in this case, affirmed the action of the Commissioner of the General Land Office in rejecting the riparian claims of De Witt and Hardin.

On the 24th August last he overruled an application of Hrs. Hardin for a rehearing in the case.

I am concluded by his action in the matter. The authorities on this point are so numerous and have been so often cited that I deem it unnecessary to repeat them here.

"It is very well settled that when a Secretary has officially decided or determined any matter or case and goes out of office
133 leaving the decision on record his successor cannot lawfully overturn it unless upon the production of such new evidence as would be sufficient in a court of chancery to sustain a bill of review or to get a new trial in a court of law."

(9 Opin. of Attorneys General, 101.)

It is not pretended in this case that any new evidence has been discovered, and I cannot but regard the matter as *res judicata*, which I am not at liberty to disturb. I am therefore constrained to decline according to your request.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

134 DEF'TS' EXHIBIT "13."

Decision of the Commissioner of the General Land Office in the matter of the claims of the Illinois Central Railroad Company, the State of Illinois, the county of Cook, Gertrude Hardin, Horatio B. De Witt, and sundry other persons for lands in township 37 north, range 15 east, Illinois, known as the bed of Wolf Lake.

135 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February* 12, 1878.

GENTLEMEN: I have considered the claims of the Illinois Central Railroad Company, the State of Illinois, by herself and by Cook county as her grantee, and sundry persons for lands lying in sections 19, 20, 29, 30, 31, and 32, township 37 north, range 15 east, third principal meridian, Illinois.

These lands constitute the bed of what is known as Wolf Lake, in Cook county, Illinois, shown by the survey of the township in 1835 as a navigable lake.

The plat of that survey was undoubtedly filed in the district land office prior to June, 1836, entries of land thereunder having been made at that time.

The waters having receded or evaporated, application for the survey of the body of land so brought into existence was made under circular issued from this office July 13, 1874. Survey was thereupon made and approved December 31, 1874. On 9th of January, 1875, copy of the plat of this survey was sent to the district officers at Springfield, with instructions to notify all claimants for the lands of a day set for hearing testimony regarding such claims, and after such hearing to transmit all the proceedings, with their joint opinion thereon, to this office.

136 Pursuant to such instructions hearing was held on February 8, 1875, and succeeding days, the proceedings, however, being considered as of date of February 8, and the following claims, with testimony, were presented for consideration:

The Illinois Central Railroad Company claims, as grantee of the State, the lands in controversy in sections 20, 30, and 32 under the act of Congress approved September 20, 1850, granting lands to the State of Illinois to aid in the construction of a railroad from Chicago to Mobile (9 Statutes, 466). These sections are within the six-mile limits of that grant, as are also, in fact, all the lands in dispute.

The State of Illinois claims for herself the lands in sections 20, 30, and 32 under the "swamp lands" grant of September 28, 1850 (9 Statutes, 519). This claim was not set up at the hearing, but has been asserted since. As it is of the same nature as the ensuing claim, it is considered in order that all known claims to the land may be passed upon.

The county of Cook claims, as grantee of the State, the lands

in sections 19, 29, and 31 under the swamp lands act of September 28, 1850.

Gertrude Hardin claims the land in sections 19 and 30 and parts of 20 and 29, and Horatio B. De Witt claims the southwest fractional quarter of section 20, both of these claims being based upon riparian ownership.

On transmitting the claims and testimony the district officers at Springfield forwarded their joint opinion thereon, adverse
137 to the claims of the Illinois Central Railroad Company, the county of Cook, as grantee of the State, the riparian claimants; the Sioux half-breed and Porterfield scrip claimants, and in favor of certain of the pre-emption and homestead claimants.

The first claim for consideration is that of the Illinois Central Railroad Company under the act of Congress approved September 20, 1850. (9 Statutes, 466.)

By that act there was granted to the State of Illinois, to aid in the construction of a railroad from Chicago to Mobile, every alternate section of land, designated by even numbers, for six sections in width on each side of the said road and its branches. This grant was transferred to the company by an act of the Legislature of the State.

Lands within the limits of the grant were withdrawn by telegram from this office September 19, 1850, followed by letters of September 20, 1850. Lands supposed to be not needed for the satisfaction of the grant were restored in 1852. The grant was adjusted in May, 1858, since which certain tracts, approved to the State in the adjustment, were found to have been disposed of prior to the grant and so noted on the margin of the approved lists as follows:

Within the six-mile limits	200 acres.
Within the fifteen-mile limits	840 acres.
Total	1,040 acres.

showing that the railroad company has failed to this extent in receiving the quantity awarded in adjustment.

138 The grant has been treated by the Department and the courts as fully adjusted, and I think this of itself is a sufficient bar to the claim. If, however, the company has any right to the lands it is by virtue of the original grant of even-numbered sections within six-mile limits, and not as indemnity for lands lost by failure of title to those embraced in the adjustment.

"There be, and is hereby, granted" are the words of the act. The Supreme Court of the United States, in the case of The Leavenworth, Lawrence and Galveston Railroad *vs.* The United States (2 Otto, 741), say, in regard to the grant then under consideration, the language being precisely similar, that "it creates an immediate interest and does not indicate a purpose to give in future. 'There be, and is hereby, granted' are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the Land Department, on this interpretation of them, has uniformly administered every previous

similar grant. Railroad Company *vs.* Smith, 9 Wallace, 95; Schulenberg *vs.* Harriman, 21 *idem*, 60; 1 Lester, 513; 8 Opinions, 257; 11 *idem*, 47." The act of September 20, 1850, therefore, passed a present interest and conveyed only land which then existed in the even-numbered sections within the six-mile limits. The question involved, consequently, is whether the land claimed was in existence at the date of the grant.

139 Meanders of what was termed a navigable lake, covering the lands in controversy, were surveyed in 1834 and 1835, and by the plat constructed from that survey this office has so far been governed in disposing of the lands in the township. The first evidence presented to this office of the existence of land within the limits of this meandered lake is found in the affidavits of Franklin A. Cleveland, George A. Rowe, Chester B. Rushmore, and Alice A. Condit, presented by H. O. McDaid, of Chicago, as attorney, with application dated August 19, 1874, for a survey of "Wolf Lake" bed. There is, however, testimony in connection with the claim under the "swamp lands" grant showing that this land was to a great extent covered with water so late as 1850, the tenor of all the evidence being to the effect that the greater part, if not all, of it came into existence some time subsequent to 1850 and prior to the survey in 1874 as a "lake bed" from which, by evaporation or other causes, natural or artificial, the waters had permanently receded, leaving within the unsurveyed area dry land, fit, in ordinary seasons, for agricultural purposes. On receipt of the application referred to survey was made by direction of this office and approved as that of the bed of a lake covered with navigable water at the time of the original survey, segregated from the surveyed public lands by the meandered lines of that survey, and consequently excluded from the operation of laws granting and providing for the disposal of

140 public lands while so designated a body of navigable water and as lands which had come into existence subsequent to the original survey of the lake and adjacent lands.

Although it is possible that at the date the railroad grant became effective there was between the actual borders of the lake and its borders, as laid down on the survey of 1835, a small strip of land, and although the evidence goes to show that, notwithstanding the survey of 1835 treats the body of water as a whole, with no division between what are now called Wolf and Hyde Lakes, there was in 1850 a strip of timbered land running from the border of the lake, in section 20, southwestwardly to its border, in section 29, thus dividing it into two parts, the testimony as to the width of this strip in 1850 is so conflicting that it is not practicable to determine, even approximately, its area in section 20; and as the existence of sufficient portion of land or swamp to bring any subdivision within the denomination of "swamp land" in 1850 has not been established I have preferred, inasmuch as the area of land in section 20 in 1850 would be very small, if the utmost claimed were allowed, to consider the failure to establish the swampy character of the land in 1850 as a failure to show that the plat of the

survey of 1835 did not correctly represent the boundaries of the land in 1850.

It being held that the land was not in existence at the date of the grant under which the Illinois Central Railroad
141 Company claims, it is also held, under the decision of the Supreme Court before referred to, that the grant did not attach to it on its subsequent formation or appearance, and the claim of the company is therefore rejected.

The claims of the State of Illinois, for herself and the county of Cook as grantee of the State, under the swamp lands act of September 28, 1850 (9 Statutes, 519), embrace all the lands in controversy.

These claims are rejected for two reasons: First, because of failure to establish the swampy character of the land in 1850, this office having uniformly held that the "swamp lands" grant was a grant *in præsenti*, and that lands to pass thereunder must have been "swamp" at the date of the grant, not subsequently brought into that condition by the recession of waters covering the same; and, second, because so long ago as November 20, 1855, the honorable Secretary of the Interior decided that the State of Illinois was not entitled to swamp lands under the grant of September 28, 1850, in either odd or even numbered sections, within the six-mile limits of the railroad grant by the act of September 20, 1850. (1 Lester, page 523.)

The riparian claims of Gertrude Hardin and Horatio B. De Witt have been denied by the action of this office in ordering and approving the survey of the lake bed, thus treating the land as belonging to the United States.

142 The claims under the pre-emption and homestead laws remain for consideration.

Lot 1 of the northeast quarter and lots 2 and 3 of the southeast quarter, section 19, in connection with lot 3 of northwest quarter, section 20, are claimed by Andrew Farrand under the pre-emption laws; declaratory statement dated January 20, 1875, alleging settlement April 24, 1874.

Lot 1, northeast quarter, section 19, with west fractional half southwest quarter, section 29, claimed by John E. Curtis; additional homestead application dated January 14, 1875.

East fractional southeast quarter, section 19, claimed by Wright Allen; additional homestead application dated January 14, 1875.

Lot 1, northeast quarter section 19, with lots 3 and 4, southeast quarter section 29, claimed by Samuel Davis; additional homestead application dated January 14, 1875.

Southeast fractional quarter northeast fractional quarter section 19, with southeast fractional quarter and south fractional quarter northwest quarter section 20, claimed by James Brown *alias* James Washington; additional homestead application dated January 14, 1875.

West half southwest quarter and south half of east half of southwest quarter, with lot 2 of southwest quarter, section 20, claimed by

Alice A. Condit; pre-emption declaratory statement dated February 1, 1875, alleging settlement August 23, 1873.

143 East fractional half southwest quarter, being lot 2, and southeast quarter southwest quarter, section 20, claimed by Randolph Crowley; additional homestead application dated January 14, 1875.

West half southwest quarter section 20, claimed by Robert Price; additional homestead application dated January 14, 1875.

Southwest quarter section 20, claimed by Orrin L. Mann; homestead declaratory statement dated January 8, 1875.

South fractional quarter southeast quarter section 20, with northeast fractional quarter section 29, claimed by Jabez G. Smale; homestead declaratory statement dated January 14, 1875; homestead application dated July 12, 1875, covering lot 1, southeast quarter section 20, and lots 1 and 2, northeast quarter section 29.

South half northwest quarter and north half southwest quarter section 29, claimed by Solomon Field; pre-emption declaratory statement dated February 1, 1875, alleging settlement June 27, 1874.

Northwest quarter section 29, claimed by Lyman D. McDaid; homestead declaratory statement dated January 14, 1875; homestead application same date.

North half southwest fractional quarter and north half southeast fractional quarter section 29, claimed by Syrena McDaid; homestead declaratory statement dated January 14, 1875.

144 West half northwest quarter section 29, claimed by Thomas C. Wilkerson; additional homestead application dated January 14, 1875.

East half southwest quarter section 29, claimed by James W. Smith; additional homestead application dated January 14, 1875.

East half northwest quarter section 29, claimed by John White; additional homestead application dated January 14, 1875.

Northeast quarter (lots 1 and 2) section 29, with north fractional northeast quarter (lot 1) section 31, claimed by Dorcas Matlock; additional homestead application dated January 14, 1875.

Fractional southwest quarter section 29, claimed by Thomas S. Mather; homestead declaratory statement dated January 14, 1875; homestead application June 1, 1875.

Lot 3, southeast quarter and northeast quarter southeast quarter section 30, with lot 1, northeast quarter section 31, claimed by Franklin A. Cleveland; pre-emption declaratory statement dated January 15, 1875, alleging settlement June 3, 1874; amended April 13, 1875, to cover above-named tracts.

East half northeast quarter, and lot 1, northeast quarter section 30, claimed by Chester B. Rushmore; pre-emption declaratory statement dated January 20, 1875, alleging settlement April 15, 1874; amended April 13, 1875, to cover above-named tracts.

Lot 2, southeast quarter section 30, claimed by George Hawks; homestead declaratory statement dated April 30, 1875.

145 Lots 2 and 3, southeast quarter and northeast quarter southeast quarter section 30, claimed by Joseph Könyvesy;

informal claim under the pre-emption laws, alleging settlement in January, 1868.

Southeast quarter section 30, claimed by Charles Carpenter; homestead declaratory statement dated January 8, 1875.

Lot 2, southeast quarter, and lot 1, northeast quarter section 30, claimed by John Medlock; additional homestead application dated January 14, 1875.

East half northeast quarter section 30, claimed by Robert H. Cummings; additional homestead application dated January 14, 1875.

East fractional half southeast quarter section 30, claimed by James Washington; additional homestead application dated January 14, 1875.

North half northeast quarter section 31, claimed by Anna E. Rees; informal claim under the pre-emption laws dated April 13, 1875, and alleging settlement in 1868 or 1869.

North fraction of northwest quarter, fractional northeast quarter, and north fraction of southeast quarter section 32, claimed by Peter Munhoven; homestead declaratory statement dated January 14, 1875; homestead application same date.

Lots 1 and 2 of northeast quarter and lot 3 of northwest quarter section 32, claimed by William Brewer; additional homestead application dated January 14, 1875.

North fractional half section 32, claimed by Charles E.
146 Rees; informal claim under the pre-emption laws dated April 12, 1875, and alleging settlement in 1853.

In addition to these I find among the papers in the case various affidavits setting up the following claims:

Ellis Bennett, for north half of southwest quarter of section 20 and south part of northwest quarter of section 20; Charles L. King, for southwest quarter of section 29, and John Collins, for southeast quarter of section 20. Apparently no attempt was made by these parties to properly initiate their claims, and they are now merely mentioned to show their consideration so far as they are deserving thereof.

It has been suggested that the land in question is not subject to disposal under the pre-emption and homestead laws, because of its being embraced within the corporate limits of the town of Hyde Park.

While it may be doubted whether an act of incorporation can confer upon a municipal government authority over land not in legal existence as such at the time of the incorporation, the discussion of such a question would be purely speculative at this time. The town has never filed any map of its corporate limits or done any act under law looking toward setting up a claim either for the land or for its exception from the operation of the pre-emption laws, and I think is precluded from so doing by the act of March 3, 1877, the incorporated town covering an area many times greater than the quantity of land to which it would be entitled under the town-site laws, and the land in question being some miles
147 from the populated portion of the town, not settled upon, inhabited, improved, or used for business or municipal pur-

poses by the town. Such being the case, I do not think the objection carries weight, and therefore pass it by without further consideration.

Andrew Farrand's pre-emption claim for lot 1 northeast quarter and lots 2 and 3 of southeast quarter, section 19, with lot 3 of northwest quarter, section 20, conflicts with the additional homestead applications of John E. Curtis, Wright Allen, Samuel Davis, and James Brown, *alias* James Washington. The additional homestead applications were received January 14, 1875. Farrand's declaratory statement was filed at the hearing February 8, alleging settlement April 24, 1874.

The testimony in Farrand's behalf shows that he settled as alleged and erected a comfortable house by June, 1874; cultivated during the year about an acre, raising melons, cabbages, &c.; fenced in the cultivated ground; erected out-buildings, which, with the house, are worth three or four hundred dollars, and cut thirty or forty tons of hay.

No evidence in contradiction was submitted, though the witnesses were cross-examined by the attorneys for the State and the scrip claimants.

I therefore conclude that the rights of Farrand are paramount to those of the other claimants, and that his filing should be received.

148 Alice A. Condit's pre-emption claim for west half, with south half of east half and lot 2 of southwest quarter (being the fractional southwest quarter) of section 20, conflicts with the homestead declaratory statement of Orrin L. Mann, and the additional homestead applications of Randolph Crowley and Robert Price. Mann's homestead declaratory statement offered January 15; Crowley's and Price's applications filed January 14, 1875; Mrs. Condit's declaratory statement offered at hearing.

It is shown that Mrs. Condit's husband went on the land in the summer or autumn of 1872 and built a house, but died in March, 1873, without having occupied the same; that in August, 1873, Mrs. C., with her two children, moved into the house, all remaining there for a short time, when finding she could not obtain schooling for the children without going to Englewood, she went thither with them, leaving her goods, &c., in the house. During her stay on the land she did some planting, seeds, &c., and made what improvements she could. After her removal to Englewood she returned at different times to look after her claim, and her elder son usually went to the house on Saturdays, remaining until Monday in occupation and possession. In the latter part of December, on his usual weekly visit, he found part of the household articles had been removed and the door of the house taken away. He immediately informed his mother, who at once procured more goods and articles to repair the damages with, and proceeded to the house for that purpose.

149 While so engaged, on 23d December, 1873, one Ellis Bennett and others forcibly dispossessed her, tore down the house, and burned the material. In the spring of 1874, when she again attempted to return, Bennett a second time drove her away, treating her violently,

so that she was afraid to again attempt to resume her occupation of the land. She instituted suit against him for forcible entry and detainer, which was decided in her favor, and from which appeal was taken by Bennett. From September, 1874, until the hearing she was sick and unable to avail herself of the decision in her favor by taking up her residence on the land.

As before stated, the papers in the case contain affidavits setting up the claims of Ellis Bennett and John Collins, covering this land and lot 3, but I find nothing therein tending to invalidate Mrs. Condit's claim or that of Farrand for lot 3. Bennett admits that he actually abandoned on account of Mrs. Condit's superior right and on promise of immunity from prosecution for his acts. Their claims were not presented at the hearing and do not appear to merit consideration.

I think the evidence sufficiently establishes the good faith and necessary acts of Mrs. Condit, and that therefore her claim is superior. If this be the final decision her declaratory statement will be received.

Lot 1 of southeast quarter, section 20, is claimed by James
150 Brown, *alias* Washington, as an additional homestead, and by Jabez Smale, in connection with lots 1 and 2 of northeast quarter section 29, as a soldier's homestead.

Although the register and receiver in their report treat these claims as if filed simultaneously, I find that Brown-Washington's application is endorsed as having been received at 9 o'clock a. m., January 14, and Smale's declaratory statement as received at 9.35 a. m., same day. Brown-Washington's application being first received, I think he is entitled to the land.

The homestead declaratory statement of Jabez G. Smale for lots 1 and 2 of northeast quarter section 29 (in connection with lot 1, southeast quarter section 20) is in conflict with the additional homestead application of Dorcas Matlock, covering the same land; Smale's homestead declaratory statement, filed at 9.35 a. m., and Mrs. Matlock's additional homestead application, filed at 9 a. m. January 14, 1875.

Smale's claim for land in section 20 has already been passed upon.

Notwithstanding the application of Mrs. Matlock appears to have been first presented, it is not accompanied by proof or *prima facie* showing of her right to land under the additional homestead law, and an examination of the papers in the entry of Cass Matlock, whose widow she claims to be, shows that no mention of military service was made therein. Smale presented *prima facie* evi-
151 dence of military service, and followed up his homestead declaration by filing homestead application for the land July 12, 1875; but that application is defective, because, although the affidavit is taken before the clerk of the circuit court, it does not show that Smale was actually residing upon the land, in which event only could the affidavit have been made before such officer.

Neither party alleges settlement; both claims as presented are imperfect, and therefore I think the time of filing should govern in de-

ciding between the parties. For that reason I think the claim of Mrs. Matlock should be considered superior if she can furnish the necessary proof of her right to make additional entry.

Solomon Field claims the south half northwest quarter, the north half southwest quarter section 29 under the pre-emption laws. Declaratory statement, dated February 1, 1875, alleging settlement June 27, 1874. This claim is in conflict with the homestead application of L. D. McDaid, the homestead declaratory statement of Syrena McDaid, the homestead declaratory statement of Thomas S. Mather, and the additional homestead applications of T. C. Wilkerson, John White, John E. Curtis, and J. W. Smith, all filed January 14, 1875. Affidavits have also been filed by C. L. King, alleging his claim for the entire southwest quarter, but, for the reasons heretofore stated in the cases of Bennett and Collins, such claim cannot be considered.

152 The testimony shows that Field went upon the land June 23, 1874, and after examination determined to pre-empt it. On 27th June he commenced erecting a substantial house and dug a well; was ordered by Ellis Bennett to desist, but continued, and by night had the frame-work of the house partially set up. During the night he was arrested at the instance of Bennett and taken to Hyde Park, but, no one appearing against him, was released after a day or two of imprisonment. Returning to the land he found it, with his improvements and material, in possession of King, who claimed under Bennett; demanded possession, which was refused; instituted suit against Bennett and King, which appears to have been decided against him by the justice of the peace, from whose decision he appealed, which appeal was pending at the time of hearing.

Much of the testimony was directed to the question of Field's competency as a pre-emptor, but it fails to show his want of qualifications. Its whole tenor shows his good faith and performance of the necessary legal acts to obtain possession of the land after he had been forcibly dispossessed. I think his rights are fully shown, and that as against the other claimants his filing should be received.

Lyman D. McDaid's homestead application, already partially passed upon, also covers the north half of the northwest quarter section 29, for which it is — conflict with the additional homestead applications of Thomas C. Wilkerson and John White. McDaid's application was received at 9.35 a. m. and the others at 9 a. m., January 14, 1875.

153 The testimony in McDaid's behalf shows that immediately upon the completion of the survey, September 29, 1874, he went upon the land and commenced the erection of a house, which had been prepared for that purpose pending the survey. While so engaged Bennett and King came and drove him and his helpers away. From that date until the filing of his homestead declaratory statement and application he does not appear to have done anything to repossess himself of the land or assert any right thereto, and his affidavit, though executed before the clerk of the circuit court, does not allege his residence upon the land. I cannot therefore consider his equities as any greater than those of the additional homestead claimants,

and as their applications were filed first I think they are entitled to the benefits of their promptitude. Wilkerson's application should be received, so far as it relates to the northwest quarter of the northwest quarter, as also should White's application, in so far as it embraces the northeast quarter of the northwest quarter.

The additional homestead application of Samuel Davis, already partially disallowed, also embraces lots 3 and 4, in the southeast quarter section 29, which claim is in conflict with the homestead declaratory statement of Syrena McDaid. Davis' application was filed at 9 a. m. and McDaid's declaratory statement at 9.35 a. m., January 14.

Davis' application being first in point of time is first in point of right, and his claim is strengthened by the fact that McDaid has not attempted to follow up his declaratory statement by making homestead application, although more than three years have
154 elapsed. If Davis can furnish proof of military service, which is now wanting, his application, so far as it relates to these lots, should be received.

Thomas S. Mather claims, in his homestead declaratory statement of January 14 and homestead application of June 1, 1875, the fractional southwest quarter of section 29. So much of this claim as embraces the north half of the southwest quarter has already been passed upon and rejected in considering the claim of Solomon Field, leaving the southeast quarter of the southwest quarter and lot 5 for consideration. It conflicts in regard to these tracts with the additional homestead applications of John E. Curtis and James W. Smith.

His homestead declaratory statement was filed at 9.30 a. m., their applications at 9 a. m. No settlement is alleged by any of them; therefore the first in time is first in right. In this respect Curtis and Smith are prior to Mather, and Curtis' application, so far as it covers lot 5, should be received, as also should the application of Smith, so far as it embraces the southeast quarter of southwest quarter.

Chester B. Rushmore claims under the pre-emption laws the east half and lot 1 of northeast quarter section 30. Declaratory statement offered at hearing and amended to cover tracts. Settlement alleged April 15, 1874.

This claim is in conflict with the additional homestead applications of R. H. Cummings and John O. Medlock.

The testimony shows that Rushmore settled as claimed;
155 erected a substantial house and outhouses; cultivated about half an acre, and resided on the land continuously until the hearing. His settlement and acts appear to have been *bona fide*, and of such a character as to constitute compliance with the requirements of the pre-emption laws. His rights, as against the other claimants, are paramount, and his filing should be received.

Franklin A. Cleveland's pre-emption claim covers the northeast quarter southeast quarter, and lot 3 of southeast quarter, section 30, with lot 1 of northeast quarter section 31. Declaratory statement filed and amended at hearing, settlement being alleged June 3, 1874.

This claim is in conflict with homestead declaratory statement of Charles Carpenter and additional homestead applications of James Washington and Dorcas Matlock. It is also in conflict with the informal claims of Joseph Könyvesy and Anna E. Rees, neither of which have been presented in proper manner or followed up, and which, therefore, do not merit consideration.

It may be questioned whether what Cleveland did prior to June 22, 1874, would enable him to properly claim settlement on June 3; but the evidence proves that on June 22, 1874, he commenced the erection of a house on the land; that while so engaged, on 25th June, parties tore down the house, destroyed the material, and drove him away; that he returned on 26th, and, on being refused possession, had the parties arrested. Then, on 18th August,
156 he commenced the erection of a house 13 by 18, with wing, into which, when finished, he moved with his family, residing therein since. He had dug a well, built outhouses and barn, fenced and cultivated about an acre, mowed hay, &c., up to the time of hearing.

I think he is clearly within the requirements of the pre-emption laws, and that his rights are superior to those of the other claimants. So holding, his declaratory statement should be accepted.

George Hawks claims lot 2 of southeast quarter section 30. Homestead declaratory statement dated April 30, 1875, indorsed as received May 3, 1875.

This claim is in conflict with homestead declaratory statement of Charles Carpenter, received January 15, 1875; additional homestead application of John O. Medlock, received at 9 a. m., January 14, and the informal claim of Joseph Könyvesy, heretofore alluded to, and which cannot be considered.

None of the remaining parties allege settlement, and, as between them, the rights of Medlock are superior, his application having been filed first. So much of it, therefore, as covers this tract should be accepted.

Peter Munhoven claims the northeast fraction (lots 1, 2, and 3) lots 1, 2, and 3, section 32. Homestead declaratory statement filed January 14, 1875, at 9.35 a. m.; homestead application same date.

157 This claim conflicts with additional homestead application of William Brewer, filed at 9 a. m., January 14, and with an informal claim of Charles E. Rees, which, not being properly presented, cannot be considered.

In Munhoven's behalf it is alleged that he went on the land September 8, 1874, built a house, and has since resided therein.

Mr. Cleveland, who testifies in the case, says Munhoven settled as alleged; that a house was built by him and others in September, 1874, in which he had resided up to the time of hearing, but which house was built of material purchased by himself (Cleveland) with money furnished for the purpose by Mr. McDaid. No evidence of cultivation or improvement was offered.

In reporting upon this claim the district officers say they are satisfied from the evidence that any improvements made in this case

cannot be considered of such a nature as to give Munhoven any priority thereby. In this opinion I concur, and decide that, as neither has rights superior to the other, in equity Brewer has the better legal claim for the land, and his additional homestead application should be received.

After rendering an opinion upon all the claims involved in the case, the district officers add a note stating that parties representing
Thomas C. Wilkerson, John White, James Brown, Dorcas
158 Matlock, and William Brewer, additional homestead applicants; Edward Hudson and John V. Dumerce, Sioux half-breed scrip claimants, and Charles D. Gilmore, Porterfield scrip claimant, have made application to withdraw parts of their claims.

I find no such application among the papers in the case. All the Porterfield scrip in the case was withdrawn by direct application to this office, but the Sioux half-breed scrip has not been. On the contrary, an application made for its withdrawal was revoked.

Inasmuch as the papers do not show the authorization of any one to act in behalf of the additional homestead claimants, and no application by them or for them for withdrawal of their claims is found among the original papers, or has been made to this office, I cannot consider the statement of the register and receiver as embodying a proper application for that purpose, and have therefore passed upon the claims as presented.

Recapitulating my conclusions in the case, they are:

1. The claim of the Illinois Central Railroad Company, under the granting act of September 20th, 1850, for the land in sections 20, 30, and 32 should be rejected.

2. The claims of the State of Illinois and Cook county, under the swamp lands grant of September 28, 1850, for the lands in controversy, should be rejected.

3. The claims of Gertrude Hardin and Horatio B. De Witt, under laws relating to riparian rights, for lands in sections 19, 20,
29, and 30, have been rejected by the action of the De-
159 partment in ordering and approving survey of the land.

4. The various locations of Sioux half-breed scrip, as enumerated and described, should be cancelled (and they are now held for cancellation) and the attempted locations rejected.

5. The pre-emption claim of Andrew Farrand for lot 1 of northeast quarter and lots 2 and 3 of southeast quarter, section 19, together with lot 3 of northwest quarter, section 20, should be allowed.

6. The pre-emption claim of Alice A. Condit for west half southwest quarter, south half of east half, and lot 2 of southwest quarter, being in all the fractional southwest quarter, section 20, should be allowed.

7. The additional homestead claim of James Brown, *alias* James Washington, in so far as it embodies the southeast fractional quarter or lot 1 of section 20, should be allowed.

8. The additional homestead application of Dorcas Matlock, in so far as it embraces the fractional northeast quarter (lots 1 and 2), section 29, should be allowed if she presents proof of her husband's military service.

9. The pre-emption claim of Solomon Field for the south half northwest quarter, and north half southwest quarter, section 29, should be allowed.

10. The additional homestead application of Thomas C. Wilkerson, in so far as it embraces the northwest quarter of the northwest quarter, section 29, should be allowed.

11. The additional homestead application of John White,
160 in so far as it embraces the northeast quarter of the northwest quarter, section 29, should be allowed.

12. The additional homestead application of Samuel Davis, in so far as it embraces lots 3 and 4 of the fractional southeast quarter, section 29, should be allowed if he presents proof of military service.

13. The additional homestead application of John E. Curtis, in so far as it embraces the fractional southwest quarter of the southwest quarter, or lot 5, section 29, should be allowed.

14. The additional homestead application of James W. Smith, in so far as it embraces the southeast quarter of the southwest quarter, section 29, should be allowed.

15. The pre-emption claim of Chester B. Rushmore for the east half, and lot 1 of the northeast quarter, section 30, should be allowed.

16. The pre-emption claim of Franklin A. Cleveland for the northeast quarter of the southeast quarter, and lot 3 of southeast quarter, section 30, together with lot 1 of the northeast quarter, section 31, should be allowed.

17. The additional homestead application of John O. Medlock, so far as it embraces lot 2 of the southeast quarter, section 30, should be allowed.

18. The additional homestead application of William Brewer, for lots 1 and 2 of the northeast quarter, and lot 3 of the northwest quarter, section 32, should be allowed.

161 19. All other claims and parts of claims under the pre-emption and homestead laws should be rejected.

Should this decision become final, the declaratory statements of the pre-emption claimants whose claims are allowed will be received as of dates tendered, and on showing proper compliance with law such claimants will be permitted to make entry of the land embraced in their filings.

The additional homestead applications, as allowed, will also, in the event of this decision becoming final, be received as of dates tendered, and certificates will issue thereon on payment of proper fees and commissions.

In the cases of John E. Curtis and Dorcas Metlock, however, proof of military service will be required before issue of certificates.

Sixty days will be allowed for appeal from this decision to the honorable Secretary of the Interior.

Respectfully, J. A. WILLIAMSON,
Commissioner.

To Messrs. C. H. Willett & C. H. Wood, Bennett, Kretzinger &

Veeder, H. O. McDaid, John R. Lewis, Isaac R. Hitt, and
162 J. N. Hardin, Chicago, Illinois; Curtis & Earle, C. D. Gilmore, A. A. Hosmer, and S. V. Niles, Washington, D. C.; William Prescott, Springfield, Illinois, and J. A. Crawley, La Porte, Indiana.

163 To which ruling and decision of the court in permitting the introduction of said decisions the plaintiff, by his counsel, then and there excepted.

And also the plaintiff, by his counsel, made a further motion in writing (and filed the affidavit of William Prescott, together with the said motion) to remand said cause to the circuit court of Cook county, Illinois, which, by leave of the court, was read and filed; which said motion and affidavit are in the words and figures following:

164 *Affidavit of Wm. Prescott.*

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the Circuit Court of said District.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE *et al.*
} In Ejectment.

WILLIAM PRESCOTT, being first duly sworn, upon his oath says that he is personally acquainted with all the parties to the above-entitled cause and personally knows the respective places of residence of all said parties at the present time, and also know- where the*ir* respective places of residence of said parties were at the date of the commencement of this suit, November 9th, 1882, and that the place of residence of said Mitchell, Smale, John I. Bennett, and Frank I. Bennett, respectively, was at that date and now is Cook county, in the State of Illinois; and affiant further states that, as he is informed and believes, said persons so named were at said time of commencement of said suit also citizens of said State of Illinois, and that at the date of commencement of this suit said Conrad N. Jordan was a resident and citizen of the State of New York.

WM. PRESCOTT.

Subscribed & sworn to before me this 19th day of January, A. D. 1886.

165 GEO. W. KEMP,
U. S. Com'r, N. D. Ills.

Endorsed: Filed Jan'y 19, 1886. Wm. H. Bradley, cl'k.

166 United States Circuit Court, Northern District of Illinois.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE *et al.*
} In Ejectment.

Now comes the plaintiff and again respectfully moves the court to remand said cause back to the circuit court of Cook county, Illinois, for the following reasons, viz:

First. Because the plaintiff and principal defendant, namely, Jabez G. Smale and John I. Bennett, were at the date of commencement of this suit and still are all of them residents of the State of Illinois; that the other defendant, said Conrad N. Jordan, is and at the commencement of this suit was a resident of either Washington, D. C., or the State of New York.

Second. That there is not in said suit a separable controversy within the meaning of the laws of the United States in relation to "removal of causes."

167 Third. That there is no Federal question involved in said cause within the meaning of the laws of the United States justifying the removal and retention thereof by this honorable court.

WM. PRESCOTT,
Att'y for Plaintiff.

(Endorsed:) Filed Jan'y 19, 1886. Wm. H. Bradley, cl'k.

168 And thereupon the court then and there denied the motion to remand said cause to said circuit court of Cook county, Illinois; to which decision and ruling of the court in denying the motion to remand said cause to said circuit court of Cook county the plaintiff, by his counsel, then and there excepted.

And forasmuch as the matters and things aforesaid are not matters of record the plaintiff, by his counsel, then and there prayed that this his bill of exceptions might be then and there and at the same time of said rulings, decisions, and denial of said motion as aforesaid signed, sealed, and settled by the court, which is accordingly here done.

And it is stipulated here in open court by counsel for the respective parties that photographic copies of the maps and plats referred to, and also that printed or other proper copies of the said opinions and decisions of the Secretary of the Interior and Commissioner of the General Land Office, may be used by the clerk in making up transcript of this bill of exceptions in court in this cause, with the same effect as if copied by the clerk and incorporated in the transcript of this bill of exceptions in the usual manner.

Given under my hand this 29th March, 1886.

WALTER Q. GRESHAM,
Circuit Judge.

Endorsed: Filed March 29, 1886, as of Feb'y 1, 1886. Wm. H. Bradley, clerk.

169 Afterwards, to wit, on the eighteenth day of January, 1887, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

CHARLES H. MITCHELL
vs.
JABEZ G. SMALE *et al.*
} In Ejectment.

Know all men by these presents that we, Charles B. Shedd and Edward A. Shedd, of Chicago, Illinois, are held and firmly bound unto Jabez G. Smale, John I. Bennett, Frank I. Bennett, and Conrad N. Jordan and each of them in the sum of five hundred dollars ($500), to be paid to said Jabez G. Smale. John I. Bennett, Frank I. Bennett, and Conrad N. Jordan or either of them or their executors or administrators, respectively; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 13th day of January, A. D. 1887.

Whereas the above-named Charles H. Mitchell hath prosecuted writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the
170 circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Charles H. Mitchell shall prosecute his said writ of error to effect and answer all costs which may be awarded or adjudged against him if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Given under our hands & seals this the 13th day of January, 1887.

CHARLES B. SHEDD. [SEAL.]
EDWARD A. SHEEDD. [SEAL.]

Signed, sealed, & delivered in presence of—
WM. PRESCOTT.

Approved.
H. W. BLODGETT, *Judge.*

Endorsed: Filed Jan'y 18, 1887. Wm. H. Bradley, clerk.

171 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record

of all the proceedings had in said court in the cause wherein Charles H. Mitchell is the plaintiff and Jabez G. Smale, John I. Bennett, Frank I. Bennett, and Conrad N. Jordan are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-fourth day of September, 1887.

WM. H. BRADLEY, *Clerk.*

172 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you, in said circuit court, between Charles H. Mitchell, plaintiff, and Jabez G. Smale, John I. Bennett, Frank I. Bennett, and Conrad N. Jordan, defendants, in an action of ejectment, a manifest error hath happened, to the great damage of the said Charles H. Mitchell, plaintiff, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1887, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eleventh day of January, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 111th year.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Charles H. Mitchell *vs.* Jabez G. Smale *et al.* Writ of error. Copy deposited for the defendants in error in the clerk's office U. S., northern district of Illinois, Jan'y 11, 1887.

173 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To Jabez G. Smale, John J. Bennett, Frank I. Bennett, and Conrad N. Jordan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Charles H. Mitchell is plaintiff in error and you, the said Jabez G. Smale, John I. Bennett, Frank I. Bennett, and Conrad N. Jordan, are defendants in error, to show cause, if any there be, why the errors mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. H. W. Blodgett, judge, this eighteenth day of January, in the year of our Lord one thousand eight hundred and eighty-seven.

H. W. BLODGETT, *Judge.*

173½ [Endorsed:] Supreme Court of the United States. Charles H. Mitchell *vs.* Jabez G. Smale *et al.* Citation to October term, A. D. 1887.

Received a true copy of the within citation this 18th day of January, 1887, and acknowledge service ther-of without prejudice to move a dismissal of said writ of error in the Supreme Court.

JOHN I. BENNETT,
Att'y for Def'ts.

174 In the Supreme Court of the United States, to the October Term, A. D. 1887.

CHARLES H. MITCHELL, Plaintiff in Error,
vs.
JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT, and Conrad N. Jordan, Defendants in Error. } In Ejectment.

And now comes the said Charles H. Mitchell, by F. Denison, his attorney, and says that in the proceedings in the above-entitled cause there is manifest error, in this, to wit:

First. The court erred in overruling the several motions of the plaintiff in error to remand said cause to the circuit court of Cook county, Illinois.

Second. The court erred in admitting in evidence the testimony of the respective witnesses, Howard, Voday, Vilein, Cole, and Gaughan.

Third. The court erred in permitting the defendants to *to* introduce in evidence upon the trial of said cause Defendants' Exhibits 4, 4½, 5, 6, 7, 8, 9, 10, 11, 12, and 13, each and all thereof.

Fourth. The court erred in rendering judgment for plaintiff for

the recovery of a part only of the lands claimed and described by plaintiff in and by his declaration and amended declaration in said cause.

175 Fifth. The court erred in finding and adjudging that the boundary of the lands of plaintiff in error were and are limited to and do not extend beyond the meander line (so called) of the original survey.

Sixth. The court erred in not adjudging that the plaintiff was entitled to claim and recover all the land lying within the description "southwest fractional quarter of fractional section 20," as described in the patent to De Witt, regardless of acreage and the so-called meander line.

Seventh. The court erred in not adjudging the plaintiff entitled to recover all the land described in the third additional count in the amended declaration in said cause.

Eighth. The court erred in not adjudging and finding the plaintiff's southerly boundary of said land to extend to at least the channel or natural depression, so called, and mentioned and referred to in the third clause of the special findings in this cause.

Ninth. The court erred in not adjudging the plaintiff's easterly and westerly boundary to extend to at least the waters mentioned and referred to in the ninth clause of the special findings in this cause.

Tenth. The court erred in its judgment in this, that the description of the land awarded and adjudged to plaintiff is indefinite, insufficient, and void.

176 Eleventh. The judgment is contrary to the law and the evidence, and is otherwise insufficient and invalid.

Twelfth. And because the special findings are contrary to law and the evidence.

And the said Charles H. Mitchell, plaintiff in error, prays that the judgment may be reversed, annulled, and altogether held for naught, and that such orders and judgment may be rendered as will remand and return said cause to the circuit court of Cook county, Illinois, and that said plaintiff in error may be restored to all things which he has lost by reason of said judgment.

FRANKLIN DENISON,
Attorney for Charles H. Mitchell, Plaintiff in Error.

Endorsed on cover: N. Illinois C. C. U. S. No. 167. Charles H. Mitchell, plaintiff in error, *vs.* Jabez G. Smale, John I. Bennett, Frank I. Bennett, and Conrad N. Jordan. Filed October 10, 1887.

the recovery of a part only of the lands claimed and described by plaintiff in and by his declaration and amended declaration in said cause.

175 Fifth. The court erred in finding and adjudging that the boundary of the lands of plaintiff in error were and are limited to and do not extend beyond the meander line (so called) of the original survey.

Sixth. The court erred in not adjudging that the plaintiff was entitled to claim and recover all the land lying within the description "southwest fractional quarter of fractional section 20," as described in the patent to De Witt, regardless of acreage and the so-called meander line.

Seventh. The court erred in not adjudging the plaintiff entitled to recover all the land described in the third additional count in the amended declaration in said cause.

Eighth. The court erred in not adjudging and finding the plaintiff's southerly boundary of said land to extend to at least the channel or natural depression, so called, and mentioned and referred to in the third clause of the special findings in this cause.

Ninth. The court erred in not adjudging the plaintiff's easterly and westerly boundary to extend to at least the waters mentioned and referred to in the ninth clause of the special findings in this cause.

Tenth. The court erred in its judgment in this, that the description of the land awarded and adjudged to plaintiff is indefinite, insufficient, and void.

176 Eleventh. The judgment is contrary to the law and the evidence, and is otherwise insufficient and invalid.

Twelfth. And because the special findings are contrary to law and the evidence.

And the said Charles H. Mitchell, plaintiff in error, prays that the judgment may be reversed, annulled, and altogether held for naught, and that such orders and judgment may be rendered as will remand and return said cause to the circuit court of Cook county, Illinois, and that said plaintiff in error may be restored to all things which he has lost by reason of said judgment.

FRANKLIN DENISON,
Attorney for Charles H. Mitchell, Plaintiff in Error.

Endorsed on cover: N. Illinois C. C. U. S. No. 167. Charles H. Mitchell, plaintiff in error, *vs.* Jabez G. Smale, John I. Bennett, Frank I. Bennett, and Conrad N. Jordan. Filed October 10, 1887.

JAN 31 1891
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1890.

CHARLES H. MITCHELL,
Plaintiff in Error.

vs.

JABEZ G. SMALE ET AL.,
Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

WILLIAM M. BOOTH,
JAMES S. HARLAN,
S. S. GREGORY,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1890.

CHARLES H. MITCHELL,
Plaintiff in Error.

vs.

JABEZ G. SMALE ET AL.,
Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

The property in controversy in this suit and for which the court below refused judgment for the plaintiff, is a portion of a ridge of land as shown substantially in the plat at page 36 of the transcript, embraced in the fractional southwest quarter of fractional section 20, and including all of the land in that quarter section, as shown on the plat, except the tract bounded by red lines, at the north or northeastern end of this ridge, and marked "4.52 ac."

The plaintiff in error was plaintiff below, and traces his title to Horatio B. DeWitt, to whom a patent was issued by the proper officers of the government on the first of March, 1850, for the southwest fractional quarter of fractional section 20, in township 37, of range 15, in

the district of lands subject to sale at Chicago, Illinois, containing four acres and fifty-three hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General. That plat is found at page 30 of the transcript.

This section was made fractional by the "navigable lake" shown on the plat, which is partly divided by the ridge of land referred to, and its continuation, the west portion of the water being known as Hyde Lake and the eastern or larger portion, extending into the State of Indiana, as Wolf Lake.

In 1874, upon the theory that the waters of this lake had permanently receded (*Trans. 48*), the entire lake bed, and also the premises in controversy, and other lands, claimed to lie outside of the meander lines of the original survey, were surveyed again and platted, as appears by the map marked "Exhibit 5," at page 41 of the transcript, and patents issued to various individuals, through whom the defendant traces his title.

It is contended for plaintiff in error, that the patent to DeWitt conveyed and assured to him title to all the land lying in the southwest quarter of section 20, leaving nothing in that quarter section to pass by the junior patents.

It is claimed for the plaintiff that, as the conveyance referred to the plat which showed a navigable lake as one of the boundaries of the tract conveyed, the lake must be taken to be the boundary of this tract; and that there was in this patent a call for a natural object, the lake, which could only be answered by running the other lines of boundary to the lake; and that this call must control courses and distances, and that, therefore, the line of

meander could not be properly held to be a line of boundary.

As the action below was ejectment, and no bill of exceptions containing the evidence is before the court, the facts of the case must be sought from the findings.

It appears in this way (*Trans. 33*), that there has been no substantial change in the condition of the land and water since the time of the original survey, so that there appears to be no question in the case, except that which arises on the construction of the patent to De Witt.

If by that instrument and the reference in it to a plat showing a navigable lake as a boundary of the tract conveyed, the patentee and his grantees are entitled to take to the lake as a boundary, then the judgment of the court below should be reversed.

If, on the contrary, the meander line, as ascertained for the purposes of this suit from the field notes of the original survey, ought to be taken as a boundary, then the judgment of the court below is right, and should be affirmed.

The substantial question of law in this case is also presented in the case of Hardin against Jordan, which is number 161 on the docket of this court; and in view of the wide range taken by the arguments filed in that case, it may not be improper to suggest some further considerations on the questions there elaborately discussed.

If the plaintiff in error goes to the water, then, as a shore owner, he would seem to be entitled to the riparian rights incident to such ownership.

The special findings showed the lake to be non-navigable in terms, but when the specific facts found are considered, as to the depth of the water, as shown by the field notes, and also the special findings, particularly the

fourth, fifth, sixth and seventh findings, by which it appears that the lake is now susceptible of some sort of navigation, and that it is connected with Lake Michigan by a river of from five to fourteen feet in depth; that the bed of the lake is below the mean level of Lake Michigan, and that it never becomes entirely dry, it might be fairly argued, perhaps, that the lake is in fact navigable, to some extent, notwithstanding the general statement to the contrary. If it is, however, in fact innavigable, the plat by which the plaintiff's remote grantor bought from the government showed a navigable lake, and, therefore, it is thought that it is not open to the government subsequently to treat the lake as non-navigable, and survey the bed thereof accordingly.

It is thought, too, that if the patent to DeWitt is to be construed as granting title to a fractional section bounded by the lake, and that lake is to be treated as navigable in fact, then no right to the bed thereof was reserved in the government, and all proceedings under the survey in 1874, and patents issued upon that survey, are absolutely void.

If, on the other hand, the lake is to be treated as not navigable, then it is believed that the great weight of authority, both in England and this country, and the best reasoned cases, establish that the ownership of the bed of the lake follows the ownership of the shore, in so far, at least, as it may be included within the description by section or quarter section lines. If this is not to be taken as the law, it would still be contended that the right of a riparian owner, even upon a body of water not navigable, is a valuable vested right, not to be divested except by due process of law and upon compensation; and that the title to the bed of the lake ought to be held upon consid-

erations of public policy to be in the State, in virtue of its sovereignty, in the same way in which the State holds title to the bed of navigable waters within its borders.

It will be perceived that there is here a substantial question of title between the grantees of the first patentee and the defendant as the ultimate grantee of those claiming by subsequent patents; and it is in this view that the suggestions and authorities touching all questions arising from this conflict of title are submitted in this argument.

I.

It has long been the rule in Illinois, as well as settled law in this court, that a meander line is not a boundary. The statute under which this patent was made provides distinctly, in the second paragraph of section 2, relating to the establishment of boundaries in fractional townships, "that in those portions of the fractional township where "no such opposite corresponding corners have been, or "can be, fixed, the said boundary lines shall be ascertained "by running from the established corners due north or "south, or east and west lines, as the case may be, to "the water course Indian Boundary Line or other "external boundary of such fractional townships." Act of February 11, 1805, Land Laws, pt. 1, chap. 72, p. 119.

Such water course is meandered, not for the purpose of establishing a restrictive line of boundary distinct from the body of water, but in order to ascertain the quantity of land in the fraction for the purpose of estimating the price to be paid, and in a general way to define the sinuosities of the shore. Such lines are never regarded as boundary lines, and it is believed very few cases can be found where it has been judicially determined that they should be so treated.

The theory of the court below seems to have been, that between the meander line and the water, there was, at the time that line was surveyed, a considerable body of unsurveyed land; and that the patent under which plaintiff claims, must be construed as embracing only so much of the land in the quarter section as would be included within the meander line, and the other lines of boundary of such quarter section, leaving title to the land between that line and the lake in the government, thus permitting the grantee to take only the number of acres specified in the patent.

It is not perceived that there is anything in the record of this case to show any intention to except this land from the operation of that grant. The rule in this court is, that there is a conclusive presumption of law that there is no land thus reserved, unless there be something in the grant to clearly show such an intention. That is also the well settled rule in Illinois.

It is true, in the field notes, that the meander line is alleged to be run along the margin of the lake, but this could not be rightly held to restrict the grant as evidenced by the patent and the plat, to which it refers, and indeed it is quite consistent with the plat.

It is not the case where the grantor conveys to the bank of a stream, reserving to himself the bed thereof. It should rather be construed as a conveyance of land bordering on a body of water, thereby conferring on the grantee, ownership to the shore, and whatever incidents attach to that ownership. Whether, in addition, title to land under water passes is discussed hereafter. Indeed, all meander lines must clearly be shown in the field notes to be run along the margin of streams and other bodies of water meandered.

The earliest case in Illinois is:

Middleton v. *Pritchard*, 3 Scam. 510.

This was a case dealing with a grant of land on the Mississippi river, and not necessarily, therefore, an authority as to the extent of the riparian rights of an owner of the bank of a lake; but it is a clear authority as to when the grant goes to the water. The court observed in that case:

"It is denied that this land is bounded upon the "river. We think there can be no question on that point. "The fact appears so clear. There is no line upon the "maps or plats, nor any direction in the field notes, nor "any other visible monument to define and designate the "southern boundary of the tract. It is true, the field "notes of the meandering of the front of this tract speak "of it as the southerly boundary. But as I before remarked, the meandering is for the purpose of ascer-"taining the quantity of land. Should it be incorrect, "still it would not entitle the party to a resurvey and new "estimate. It is sold more or less. If there be more, "the purchaser gets it; if it be less, he loses it. This, "therefore, cannot control."

The action was trespass *quare clausum*. The *locus in quo* was a small island or peninsular in the river which was claimed to be beyond the lines of the government survey under which the plaintiff's lessor had acquired title.

This case has been consistently followed in numerous adjudications by the same court.

Lovingston et al. v. *St. Clair Co.*, 64 Ill. 56.

Canal Trustees v. *Haven*, 5 Gil. 548.

The opinion in the latter case was written by Mr. Justice Trumbull, and he ruled distinctly that the meander lines not shown on the plat by which the grant was made, defining and limiting the land granted, could not be considered as a boundary, but that a water course was the true boundary.

The same ruling is found in

Houck v. *Yates*, 82 Ill. 179.

The court observed:

" But the plat, showing the river as the boundary of " appellee's purchase, and the additional fact that the strip " of land between the meander line and the river was not " surveyed or platted, would seem to leave no room for " doubt that the river was intended for the southern bound- " ary of appellee's land."

To the same effect is

Brooklyn v. *Smith*, 104 Ill. 429.

Fuller v. *Dauphin*, 124 Ill. 542.

The latter case turned wholly on the question of whether the meandered line was a boundary, and decided that such a line would not be so regarded, where it was not shown on the plat by which the conveyance was made. In this case, as in the case now before the court, the land in controversy was never surveyed or platted; that is to say, it was between a meander line and the water, and, therefore, not included within any lands actually surveyed, and that is the fact in this case.

In another case the court held, where a conveyance was made according to a map or plat, that the plat was as much a part of the description as if it were drawn in the description, and as this showed the Desplaines river as a boundary, there being but a single line indicating the

river line, that the river was the boundary, and the grant one to the middle of the stream.

The court observed:

"The river being the boundary line, it was a fixed "monument on that side and all the inquiry into the dis- "tance from the starting point, which is also a fixed mon- "ument, to the river, and from the river to other points "indicated in the description, is unimportant, for no rule "of law is better settled, than in such cases fixed monu- "ments always control courses and distances."

Piper v. *Connelly*, 108 Ill. 646.

The comments on this case in a later case show clearly when a conveyance bounding property on a river may be so construed as to limit the owner's right to the bank of the stream. But in that case it is distinctly held that where a conveyance is bounded by a road or a river, either in terms or by reference to a plat, that the grantee takes to the middle of the stream, and *a fortiori* must he be held to go to the water.

People v. *Madison Co.*, 125 Ill. 9, 24-5.

In this case the meandered line was a purely imaginary mathematical line. It was not marked nor located by monuments of any kind, neither staked nor blazed on the trees, which counsel for defendant is at some pains to demonstrate were abundant at this point. Indeed, a case could not well be imagined to which the general principle that a line of meander is not, and ought not to be a boundary is more clearly applicable than the case before the court. Nor was there ever a record more absolutely barren of facts and circumstances on this question suggestive of the propriety of any deviation

from the general rule. Learned counsel, in order to break the force of these decisions which commenced with the beginning of jurisprudence in Illinois, and have continued in an unbroken line, and with entire consistency up to the present time, cites several cases from Nebraska, the decision of Mr. Justice Miller, in a Wisconsin case, which is hereafter alluded to, and one Iowa case, in which it was held that where a bayou of the Missouri was meanandered instead of the river itself, that, and not the river, was the boundary. If the decisions of the Supreme Court of Illinois, settling a question touching title to lands within her borders are not regarded as necessarily controlling, they are fully supported by the great weight of authority elsewhere, and entirely accord with the decision of this court.

In another case it was held, where the government patented lands bounded by the Chicago river, that the grantees became the owners of the water and the soil to the center of the stream.

Chicago v. *Laflin*, 49 Ill. 172.

The rule is equally well settled in favor of the plaintiff in error in this court.

Jones v. *Johnston*, 18 How. 150.

This case does not deal particularly with the question of whether a meander line is a boundary, but holds that where a call for a boundary was a lake, the grant would go to the water. In a later case this court established that, in ascertaining the boundaries of surveys or patents, the universal rule is this: That whenever natural or permanent objects are embraced in the calls of either, these have

absolute control, and both course and distance must yield to their influences.

Brown v. *Huger*, 21 How. 305–318–320–1.

The court therefore held that where a line is described as running in a certain direction to a river, and thence up or down with the river, those words imply that the line is to follow the river, and not to be run by courses and distances.

The same general principle was applied in the leading case of

Jones v. *Soulard*, 24 How. 41.,

and the precise question was adjudicated in the case of

Railroad Co. v. *Schurmeier*, 7 Wal. 272.

The same doctrine is laid down in a later case, affirming the same case in Illinois.

St. Claire Co. v. *Lovingston*, 23 Wall. 46.

There this court held that where a survey and patent showed the river to be one of the boundaries of the tract, "it is a legal deduction that there is no vacant "land left for appropriation between the river and the "river boundary of such tract," (p. 63). Numerous cases to this effect are cited, establishing that a natural object must be taken to be the boundary, and that courses and distances cannot prevail.

The exact question at issue seems also to be determined by the recent case in this court.

Jefferis v. *East Omaha Land Co.*, 134 U. S. 178.

In that case it was distinctly ruled that a meander line was not a boundary, and that where a plat is referred

to in a patent, showing a river as the northern boundary of the fractional section and lot therein, that the river must be taken to be the boundary of that lot on the north. This case was heard by Mr. Justice Brewer, at that time judge of the Circuit Court for the Eighth Circuit. He at first reached a different conclusion from that announced by this court, but on re-hearing, announced views which were consistent with those held by this court.

In arriving at the opinion first announced, it appears that the learned justice was influenced somewhat by the opinion of Mr. Justice Miller, announced at the circuit in the case of

Granger v. *Swart*, 1 Woolw. 88.

In that case views were laid down which are, probably, inconsistent with the position of the plaintiff in error in this case, and also with the views of this court as announced in the cases cited.

There are a few other cases found in some State courts holding a similar doctrine, already referred to, but it is not believed that it is necessary to comment particularly upon them, as they are obviously inconsistent with the law of Illinois, and the settled rule adopted by this court. Nor, although the decision in *Granger* v. *Swart* carries the weight which naturally attaches to all opinions of the great judge who decided it, can it seriously militate against the long line of authorities, which establish on unassailable grounds, the position here contended for.

It is believed that this rule is not only abundantly warranted by authority, but also that it rests upon sound reason and just notions of correct governmental policy. It would seem to seriously threaten the stability of titles to land upon water courses, if, upon the suggestion that the

meandered lines run for the purpose of showing these waters on the plats, and of ascertaining the quantity of land in fractional sections, failed to include the full quantity of land in such fractions, the ministerial officers of the government could be permitted to have a new survey made, and the land thus surveyed sold so as to cut off rights, riparian and otherwise, which the holder of the first patent might suppose to be vested in himself; and that no good reason can be urged why a grant by the government according to a plat showing water as a boundary, should not go to the water, irrespective of courses and distances, as must be conceded to be the rule applicable to grants by individuals.

It is not contended that in case of grave mistake a court of equity would be powerless when appealed to by the United States, and the proper parties were brought before it to revise such errors and cause a resurvey to be made. Such cases may possibly be presented, though when they are this court would undoubtedly act with great caution and circumspection in vacating the solemn instruments by which the nation assures to purchasers their legal titles

No such question is presented in this case, but simply the question whether in an action at law, and collaterally, these instruments can be thus assailed and overturned. The rule should be more rigidly applied to grants by the government, when thus called in question, than to those made by individuals, as it is, as this court has often declared, of the highest importance that the validity and stability of grants by the government should not be lightly assailed, nor readily called in question upon inadequate grounds.

It is submitted that upon this controlling question in

the case, the judgment complained of is erroneous, and inconsistent with the decisions of this court, and of the Supreme Court of Illinois, already cited. This being a question touching the title to realty, it is believed that this court would follow the decisions of the Supreme Court of Illinois on the subject, as laying down a rule of property for that State.

Barney v. *Keokuk*, 94 U. S. 224.

This question is not, however, at all material, as the decisions of this court are explicit and conclusive upon it.

The general rule is settled by numerous authorities that a meander line is not a boundary.

Kraut v. *Crawford*, 18 Iowa, 549–553.

The language of the opinion in that case is so clear on the exact point in contoversy here, that a quotation from it seems very pertinent.

"The plaintiff's theory seems to be, that the defendant "is only entitled to the quantity of land called for in the "patent and shown on the plat; that the grant is limited "to the meander line. This is an error. The grantee "gets all down to the river, be it more or less. The land is "meandered chiefly to obtain the quantity, and the meander "line is not a line of boundary. As above remarked, the "government plat shows defendant's land to abut upon "and to be made fractional by the water course, and the "grant of it by the government will at least extend to the "water, so as to give the grantee, under all circumstances, "the full benefit of the river front. Once a riparian pro-"prietor, always so, because accretions, or newly-formed "ground, belong to such proprietor, *jure gentium*, and "because the government cannot afterward grant such "accretions of newly-formed ground to another."

Again,

"If the *locus in quo* was in existence when the land was "surveyed and sold by the United States, it not being re- "served, and the official plat showing the tract now owned "by the defendant to extend to the river, no right to or over "any of the ground could subsequently be sold by the gov- "ernment, nor acquired by the plaintiff, not even though "the *locus in quo* be situated between the river and the "meander line of the original survey."

Ross v. *Faust*, 54 Ind. 473.
St. Paul Railroad v. *First Div. Railroad*, 26 Minn. 31.
Menasha Co. v. *Lawson*; 70 Wis. 600.
Clute v. *Fisher*, 65 Mich. 48.

The citation of cases holding this proposition might be greatly extended, but those have been selected which seem in their facts and language to be most clearly applicable to this case. It is submitted that the DeWitt patent conveyed all the land in the quarter section, leaving nothing whatever for the junior patents to operate on.

II.

As to the ownership of the bed of the lake, it may be observed that it has been said in Illinois (*Trustees of Schools* v. *Schroll*, 120 Ill 509) that a grant of land bounded by a natural lake or pond extends only to the water's edge. The court also observed that the proof did not show whether the lake was in fact navigable. Those observations were made in a case which clearly did not call for them, because the court distinctly held that it did not appear by the record that the grant in controversy was bounded on the lake, and for the reason that the patent deed, in the language of the court, "contained no

intimation that the land conveyed bordered on a lake or stream." And again, as "No data is given from which we can determine the width or depth of any lot," that the parties claiming the bed of the lake were not in this case shown to be the owners of the shore.

Earlier decisions fully commented on in the brief filed for the plaintiff in error, in *Harding against Jordan*, show a strong tendency in the same court to hold the contrary view.

Thus, in *Beckman* v. *Kramer*, 43 Ill. 447, the plaintiff showing title to land bordering on a lake was held to have an exclusive right of fishery, unless restricted by local law or well established usage; and it seems to be intimated in *Washington Ice Co.* v. *Shortall*, 101 Ill. 46, although that was a case brought by a riparian proprietor for damages for removing ice from the bed of the river, that by the common law, as held in Illinois, only arms of the sea and streams where the tide ebbs and flows could be regarded as navigable, so as to limit the shore owner to the water line.

It is true, as to Lake Michigan, it is held (*Seaman* v. *Smith*, 24 Ill. 521), that the shore owner stops at the usual stage of water; but the same considerations which sustain the propriety of such a rule as to land bordering on the sea, are clearly applicable to these great inland seas.

City of Chicago v. *Illinois Central*, 33 Fed. R. 730.

In Michigan the question has been very fully discussed, and the rule is there well settled by a long series of cases, that the riparian owner of an inland lake takes

to the bed of the lake, within the lines of his grant, if projected.

Rice v. *Ruddiman*, 10 Mich. 125.
Pere Marquette Boom Co. v. *Adams*, 44 Mich. 403.
Clute v. *Fisher*, 65 Mich. 448. (Already cited.)

In the latter case it is held that the rule is applicable both to navigable fresh water and to small inland lakes, whether navigable or not.

Also in *Lembeck* v. *Nye*, 24 N. E. Rep. 686, a decision of the Supreme Court of Ohio, and in numerous cases in Indiana.

Ridgway v. *Ludlow*, 58 Ind. 248.
Edward v. *Ogle*, 76 Ind. 302.

And expressly in

Stoner v. *Rice*, 121 Ind. 51,

as to land bordering on Wolf lake.

These cases do not seem to be based at all on the question of the navigability or innavigability of the lakes, title to the bed of which they determine.

The case of *Clute* v. *Fisher*, in Michigan, already cited, and the list of cases cited from Indiana, distinctly hold that a division of the bed of the lake is to be made in accordance with the lines of the grant, in this case the quarter section line. The Ohio case seems to hold the contrary view.

Menasha Co. v. *Lawson*, 70 Wis. 600, already cited, indicates that the boundary should fall on the lines of the grant as projected into the water.

Questions as to the ownership of the bed of inland

lakes is exhaustively examined in a recent case in New York, *Smith* v. *City of Rochester*, 92 N. Y. 463. and the right of the owner of the shore to the bed of the lake fully established. It is not necessary, therefore, to examine earlier cases in the same jurisdiction cited by counsel for defendant to establish the contrary.

The same rule is laid down in England.

Bristow v. *Cormican*, Law Rep. vol. 3, part second, 641, a decision of the House of Lords.

In Wisconsin the contrnry rule seems to obtain, as it does also in Massachusctts, not on common law principles, but under the local law of that State.

Hittings v. *Eames*, 121 Mass., 139.

It is submitted, however, that so far as lakes not navigable are concerned, every consideration of public policy and legal analogy would require that the shore owner should be held to take title to the bed of the lake.

It is thought that, in this case, where the grant was of a fractional quarter section, the grantee should be held entitled to s› much of the lake as would be included within the quarter section lines, if projected. In other cases a different rule might be applicable. But where a purchaser acquires land on a lake, though not navigable, and thus becomes entitled to some measure of riparian right, as for instance, to use the water for domestic purposes, the right of accretion, an important and valuable right, to the similar right to acquire land by reliction, a right which is fully recognized in States which deny the title of the shore owner to the bed of the lake (*Boorman* v. *Sunnuchs*, 42 Wis. 243), and possibly some other riparian rights, it would be a most unjust rule which should assume that the government in patenting such shore lands, had re-

served the bed of the lake, to be again surveyed and sold to other purchasers who might thus become entitled to it and utterly destroy the riparian rights of the shore owners. Accordingly it is held that the right of a riparian owner to access and use of the water accretion, and reliction is the same where he has bought on a meandered lake, whether the lake be, in fact, navigable or not. *Boorman* v. *Sunnuchs*, just cited. It would very much surprise many of the owners of homes on small inland lakes, scattered throughout the Northwest, which are innavigable just as strictly as is Wolf Lake, and in fact much more so, to find that the government had patented the bed of these lakes to other parties, who had thus acquired a right to monopolize them for the purposes of trade and manufactures. It is not known that this has been generally attempted, or believed to be practicable, and there would be much reason in holding, if the title of the lake bed does not go with the grant of the shore, that should it be remitted to the control and administration of the various States by analogy, on the principle which makes them successors of the right of sovereignty, *jus regalis*, by which the general government held the bed of navigable waters in new States prior to their admission into the Union. This seems to be the rule in Massachusetts.

Another most important and valuable right in this case is the right to improve the navigability of the lake, connected as it is with Lake Michigan, and this it is which gives its great prospective value to the property in controversy. Here is a lake with a sandy bottom, in the region near Lake Calumet, for the improvement of which latter lake appropriations have been made by Congress, having already a considerable depth of water, and connected with Lake Michigan by a deep river. There can

be no doubt whatever that the right of a riparian owner on such a lake is essentially the same in character as in a lake navigable in fact, as indeed, is held in the Wisconsin case. And in this case, with the obvious possibilities of making the lake navigable to the commerce of the great lakes, that right is in all essentials identical with riparian right on a navigable lake.

III.

Wolf Lake was shown on the plat by which plaintiff's remote grantor purchased, as a navigable lake; and it is thought that the subsequent grantees from the government can not now claim title to the bed of the lake, even if it were the subject of grant if the lake were in fact not navigable, by proving that the lake is unnavigable.

It is contended that the government is bound by this plat. It has been held that the government having sold by erroneous survey, was bound by it, and that the officers of the land office could not, on discovering the error, patent the land so conveyed and occupied by the grantee, to a subsequent purchaser.

Lindsey v. *Hawes*, 2 Black, 564.

So it has been held by this court that when the officers of the land department decide controverted questions of fact, in the absence of fraud, imposition and mistake, their decision is final and not examinable by the courts.

Johnson v. *Towsley*, 13 Wal. 72.

And in a subsequent case this court has held where a patent was issued by the government to Missouri, granting swamp lands, duly selected by the Secretary of the Interior, that it could not be impeached in an action at

law, by showing that the lands which it conveyed were not in fact swamp, and overflowed.

French v. *Fyan*, 93 U. S. 169.

A similar case is:

Erhardt v. *Hogaboom*, 115 U. S. 67.

In the latter case it was held that it was the duty of the land department, and of the Secretary of the Interior as its head, to determine whether land patented to a settler is of a class subject to settlement under the pre-emption laws, and his judgment as to this is not open to contest in an action at law. Therefore, the court declined to permit parol testimony to be received tending to show that the lands patented under the preëmption laws were swamp and overflowed.

Again, in a later case, the court reaffirmed the doctrine of *French* v. *Fyan*, and held that the identification by the Secretary of the Interior of lands as swamp and overflowed, and, therefore, passing under the act of September 28, 1850, granting swamp lands to Arkansas, and other States, was conclusive against collateral attack.

Wright v. *Roseberry*, 121 U. S. 488.

The same doctrine is held in *Steele* v. *Smelting Co.*, 106 U. S. 447, as to mineral claims.

It is thought that there is strict analogy between these cases and this case. Ownership of land on a navigable lake carries with it certain vested riparian rights. It is held that the States hold title to the navigable waters and the soils under them, in right of their sovereignty.

Martin v. *Waddell*, 16 Peters, 367.
Munford v. *Wardell*, 6 Wal. 428.
Pollard's Lessee v. *Hagan*, 3 How. 312.

And the States admitted after the Revolution hold title to the bed of navigable waters in the same way as do the original States.

Weber v. *Harbor Comnrs.*, 18 Wal. 357.

Riparian right on a navigable body of water is a vested right which can not be destroyed except upon compensation.

Yates v. *Milwaukee*, 10 Wal. 497.

It is held in New Jersey that the State could not fill in nor authorize others to fill in lots under water in front of any shore owner, and thus deprive him of access to them, and it was said:

"That if the State grants this land for private pur-
"poses, it loses its regalia and sovereignty. And the
"grantee would have no right to convert and change the
"nature of the soil to such purposes as would materially
"injure the rights of adjoining riparian owners."

Keyport v. *Steamboat Trans. Co.*, 18 N. J. Eq. 13.

Martin v. *Waddell, and Smith* v. *Rochester*, 92 N. Y. 463–484.

But, however this may be, and whatever right the State might have to control the disposition of the bed of this lake by legislation, if it were navigable, certainly junior patentees from the general government would have no right to invade its waters and exclude the shore owner from his vested and riparian right.

It is not denied that, under the principles laid down by Mr. Justice Bradley, in

Stockton v. *Baltimore & New York R. R.*, 32 Fed. Rep. 9,

Congress, under its power to regulate commerce, might

make any dispositions in aid of that object of the bed of the lake which commended themselves to legislative discretion. But that is a far different proposition from saying that the ministerial officers of the land department may, after a patent vesting in the grantee a valuable riparian right, proceed to patent the bed of the lake, which they have themselves formerly determined to be navigable, to other parties, and thus destroy a vested right of property.

It is not convenient, and would not tend at all to the stability of titles, which ought to be effectually and permanently assured by an instrument of the solemnity and dignity of a patent from the government, to permit inquiry in every case as to the physical character of the land conveyed by the patent, when that is a matter which has been officially ascertained and promulgated by the officers of the land department. If the government, through its proper officers, patents land as swamp and overflowed, in a collateral proceeding, the physical character of such land should not be open to investigation. So in mineral claims, and so if government lands are granted as bordering upon a navigable lake it ought not to be open to those claiming under junior patents to deny that the lake was in fact navigable, and to predicate rights as against those claiming under the older patents upon this proposition.

Cragin v. *Powell*, 128 U. S. 691.

It is true, as has been pointed out by Mr. Justice Gray, with usual accuracy (*Commonwealth* v. *Vincent*, 108 Mass. 441), that there is some ambiguity in the use of the term navigable, and that the Supreme Court of Illinois has definitely settled the proposition, that public waters of this State are not to be deemed navigable in the sense of the

common law, because they are not subject to the ebb and flow of the tide. But it is also true, that the decisions of that court settle that the ownership of the bed of Lake Michigan, in so far as within the State of Illinois, is in the State; and if it is taken to be settled in the same court that the ownership of the bed of inland lakes is not in the shore owner, then, by analogy, and most undoubtedly where such lakes are to be regarded as navigable, the title to the land under them ought to be held to be in the State, upon the same trusts and for the same public use as those which mark its holding of the bed of a great lake like Lake Michigan.

To adopt any other rule than that contended for, as to the effect of marking this lake as a navigable lake on the plat, would seem to lead to endless confusion, it being a question of fact to be determined in each case by varying testimony, which part of the bed should be held to be subject to private ownership, and which owned by the State.

It would not be just to those who had bought on the faith of the representation contained in this plat that their right to go to the edge of the water should be subject to such hazard.

Title to the bed of this lake must rest somewhere. By surveying and treating it as navigable, the government has disclaimed title. If it be considered that under the rule in Illinois, it does not pass to the riparian owner, it should then be held to rest in the State, in virtue of its sovereignty.

It is thought that, in any event, the DeWitt title goes to the water, and that the defendant shows no title nor interest whatever, either in the land granted by the DeWitt patent, nor to the bed of the lake.

And it is especially to be noted that the findings

emphatically negative the assumption on which all the junior patents were issued, namely, that the waters of the lake had, in 1874, permanently receded. These patents are absolutely void and inoperative to confer any rights whatever on defendant.

IV.

If the court should be of opinion that the first patent conveyed to the lake, then clearly the second patents are as to the premises in controversy wholly void, and the decisions of the officers of the land office, relied upon by the defendant a nullity.

Grantham v. *Atkins*, 63 Ill. 356.
Gilmore v. *Sapp*, 100 Ill. 297.
Stoddard v. *Chambers*, 2 How. 284.
Morton v. *Nebraska*, 21 Wal. 660–674–5,
Polk's Lessee v. *Wendal*, 9 Cr. 87.
Minter et al. v. *Crommelin*, 18 How. 87.
Moore v. *Robbins*, 96 U. S. 530.
U. S. v. *Minor*, 114 U. S. 233.
Smelting Co. v. *Kemp*, 104 U. S. 636.
Doolan v. *Carr*, 125 U. S. 618.

These cases are so clear and explicit on this point that discussion would seem unnecessary. But the very learned and able counsel for defendant has argued at great length, and cited many cases, including some of the foregoing, to establish that the decision of the commissioner of the general land office, and of the Secretary of the Interior on the appeal of DeWitt are a bar to the prosecution of this suit by plaintiff. It appears that the officers of the land office having, without notice to DeWitt, and on proofs shown in this case to be false, surveyed and patented in 1874, land already

conveyed by his patent; when he afterwards appeared before them, held that as they had already wholly disregarded his rights, they could not then recognize them in any way.

And that is the precise ground upon which they proceeded, as appears by the decision of the Secretary, Mr. Schurz (*Trans. 48*).

The theory on which the survey of 1874 was ordered is stated at page 60 in the opinion of Mr. Williamson, then commissioner, as follows:

"On receipt of the application referred to survey was "made by direction of this office and approved as that of "the bed of a lake covered with navigable water at the "time of the original survey, segregated from the sur- "veyed public lands by the meandered lines of that "survey, and consequently excluded from the operation "of laws granting and providing for the disposal of public "lands while so designated a body of navigable water and "as lands which had come into existence subsequent to "the original survey of the lake and adjacent lands."

There is not the slightest pretense that there is any truth whatever in this, and the findings expressly negative any such idea. Indeed, learned counsel for defendant, whose investigations — geographical, topographical and hygrometrical — touching these premises, appear to be thorough and exhaustive (*Brief, pp. 1–16*), concedes that the commissioner was in error in this point (*Brief 29*); an error to which the affidavits of Mrs. Condit, the patentee under whom defendant claims, and her associates, may have somewhat contributed (*Transcript, 60*).

But if this were not so the result would be not different. The question whether the officers of the land department proceeded on notice to DeWitt is wholly

immaterial. Their jurisdiction over the subject matter was entirely lacking. In a general way it is their duty to administer upon the public lands of the government. They have no general authority to sit as courts and try title to all lands which may have been originally acquired by patent. If the DeWitt patent passed title to the premises in controversy the grantee thereby acquired an absolute indefeasible estate therein, which was as unassailable before the officers of the land department as title to any property, real or personal, whether originally traced to government or not.

The courts are open to try issues of this character, and it is a suggestion repugnant to the spirit of American institutions and inconsistent with the just distribution of governmental powers, to say that these judicial functions of the highest importance are cast upon officers whose duties are essentially executive and ministerial. Indeed, the etymological signification of the word jurisdiction is here suggestive. It is a declaration of the law, and, as such, to be promulgated by the courts. The construction of the DeWitt patent, in so far as the premises herein involved are concerned, depends purely on a question of law, and upon such a question the Department of the Interior, a bureau of the executive, must yield to the judicial branch, and listen to the exposition of this court, the final repository of this, the third great co-ordinate governmental power.

One of the earliest cases in this court touching the question is *Polk's Lessee* v. *Wendal, supra*, where it was held that equity was the proper tribunal in which to assail a patent, but that where the State had no title to the thing granted, then the patent was void, and might be so held in an action at law.

The same doctrine was emphatically announced in *Stoddard* v. *Chambers*, and again in *Minter* v. *Crommelin*. In all these cases the officers of the land department had acted as they did in this case in ordering the survey of 1874, but not so far as appears upon notice and contest between rival claimants; and the case of *Martin* v. *Nebraska* approves these cases and declares a second patent to be void.

The exact point at issue was decided in *Moore* v. *Robbins*, and the law on this question definitely settled in a profound, lucid and philosophical opinion by the late Mr. Justice Miller.

In that case Moore bought land at public sale in Illinois. Bunn claimed a prior preëmption right. The local land officers decided in favor of Bunn. Moore appealed. The commissioners decided in his favor. A patent was issued to him and afterwards Bunn appealed to the Secretary of the Interior who decided in his favor. The Supreme Court of Illinois held this decision conclusive on Moore, but this court decided otherwise and reversed the judgment appealed from. This court then said:

"With the title passes away all authority or control "of the executive department over the land, and over the "title which it has conveyed. It would be as reasonable "to hold that any private owner of land who has conveyed "it to another can, of his own volition, recall, cancel or "annul the instrument which he has made and delivered. "If fraud, mistake, error, or wrong has been done, the "courts of justice present the only remedy. These courts "are as open to the United States to sue for the cancella-"tion of the deed or reconveyance of the land as to indi-

" viduals; and if the government is the party injured, this " is the proper course" (p. 533).

Again, referring to the power of the Secretary of the Interior after patent, it is said: " He is absolutely " without authority. If this were not so, the titles derived " from the United States, instead of being the safe and " assured evidences of ownership which they are generally " supposed to be, would be always subject to the fluc- " tuating, and in many cases unreliable, action of the land " office. No man could buy of the grantee with safety, " because he could only convey subject to the right of the " officers of the government to annul his title. If such a " power exists, when does it cease? There is no statute " of limitations against the government; and if this right " to reconsider and annul a patent after it has once become " perfect exists in the executive department, it can be " exercised at any time, however remote It is needless " to pursue the subject further. The existence of any such " power in the land department is utterly inconsistent with " the universal principle on which the right of private " property is founded" (pages 533–4).

The cases are parallel, and here as there the action of the land officers is utterly void.

The whole question was fully examined, and the same conclusion reached in

Smelting Co. v. *Kemp*, 104 U. S. 636.

Mr. Justice FIELD stated the rule perspicuously and accurately thus:

" On the other hand, the patent may be collaterally " impeached in any action, and its operation as a con- " veyance defeated by showing that the department had " no jurisdiction to dispose of the lands; that is, that the

" law did not provide for selling them, or that they had " been reserved from sale, or dedicated to special pur- " poses, *or had been previously transferred to others.* In " establishing any of these particulars the judgment of the " department upon matters properly before it is not as- " sailed, nor is the regularity of its proceedings called into " question; but its authority to act at all is denied, and " shown never to have existed " (p. 647).

It is not deemed necessary to comment on the other cases. They are consistent, and afford no support whatever, to defendants contention. It is conceded by plaintiff that if the government might lawfully patent the lands in controversy at the time the second patents were issued, they could not be assailed in this action, though based apparently on gross fraud and perjury—the remedy would be in equity. But, if at that time, title to this property had passed to DeWitt, then these subsequent patents are absolutely void, and the decisions of the officers of the land department against the senior patent were rendered in proceedings strictly *coram non judice*, and are wholly void.

The case of *Cragin* v. *Powell*, 128 U. S. 691, cited by counsel, is not inconsistent with other cases, and, indeed, is an authority of no little weight in favor of sustaining the position of the plaintiff, that the government is bound by the survey, and by the representation on the plat, that the lake was a navigable lake; but, on the point immediately under examination, Mr. Justice LAMAR observed that it was settled

" That the power to make and correct surveys of the " public lands belongs to the political department of the " government; and that *whilst the lands are subject to the* " *supervision of the General Land Office*, the decisions of

" that bureau, in all such cases like that of other special " tribunals upon matters within their exclusive jurisdiction, " are unassailable by the courts, except by a direct pro- " ceeding."

This court, in that as in every other case, carefully observed the distinction between the decisions of the land department made whilst lands are subject to the supervision of the officers of that department, and attempts made through that department to adjudicate upon conflicting claims after a patent has duly issued and all title passed from the government, and entirely beyond the superintendence or administration of this branch of the executive. Indeed the learned counsel concludes his discussion of this question with a concession which absolutely demonstrates the unsoundness of his position. He observes (*p. 82*):

" Had the patents to the fractional tracts purported to " convey these lands, and had the acreage purchased and " paid for by Holbrook and DeWitt embraced them, the " jurisdiction would not be claimed to exist. But the " acreage purchased and paid for and covered by the de- " scription in the patents did not extend beyond the mean- " der line."

If it be true that the boundaries of the tract granted by the patent to DeWitt can not be extended beyond the line of meander, then the defendant need not rely upon the decision of the Secretary of the Interior to sustain his title. If the boundaries are to be projected, in accordance with the repeated decisions of this court and that of the Supreme Court of Illinois, and the overwhelming weight of authority, to the water, as shown on the plat, irrespective of the meander line, then these patents did purport to convey the premises in controversy, and did actually convey them, so that there was nothing for sub-

sequent patents, purporting to grant the same premises, to operate on, and no title remained in the government to be conveyed, nor any interest in the premises, upon which the jurisdiction of the land department to adjudicate upon these questions could attach.

The very question in the case is, did the patent to DeWitt convey these lands? If it did, then the learned counsel concedes that all he has said as to the conclusive force and effect of the decision made by the officers of the land department is wholly inapplicable; and that is a proposition in which it is not difficult to entirely concur.

Some things in the brief of counsel are more especially applicable to No. 161, *Hardin against Jordan*, instead of the case now under particular examination, but the general questions of law involved are perhaps identical.

V.

As to the question of jurisdiction, it is not proposed to argue that at any great length here; that subject is discussed in the brief filed by Mr. Prescott, also for the plaintiff in error, where is full discussion of various points which it has been thought unnecessary to duplicate in this argument.

But the facts are that this case was brought originally in the Circuit Court of Cook County, and afterwards removed to the court below.

The two Bennetts and Smale, citizens of Illinois, were originally made defendants, and Jordan, a citizen of New York, was afterwards admitted, and made a showing that indicated that he had succeeded to the rights of the Bennetts. Smale was a tenant of Jordan and in possession of the property, and, under the statute of Illinois, was, therefore, an indispensable party to an action of ejectment, and, indeed, the only indispensable party.

Removal was sought to be made under section 2, chapter 137, of the laws of 1875, commonly known as the removal act of March 3d, in that year (*Supplmnt. to Rev. Stat. 173*). That section is as follows:

"That any suit of a civil nature, at law or in equity, "now pending or hereafter brought in any State court, "where the matter in dispute exceeds, exclusive of costs, the "sum or value of $500, and arising under the Constitution "or laws of the United States, or treaties made, or which "shall be made under their authority, or in which the "United States shall be plaintiff or petitioner; or in which "there shall be a controversy between citizens of different "States, or a controversy between citizens of the same "State, claiming lands under grants of different States, or a "controversy between citizens of a State and foreign States, "citizens or subjects, either party may remove such suit "into the Circuit Court of the United States for the "proper district.

"And, when in any suit mentioned in this section "there shall be a controversy which is wholly between "citizens of different States, and which can be fully deter- "mined as between them, then either one or more of the "plaintiffs or defendants actually interested in such con- "troversy may remove said suit into the Circuit Court of "the United States for the proper district."

Under the authority of *Phelps* v. *Oakes*, 117 U. S. 236, the removal could not be made under the second clause of this section, because there is not a controversy wholly between citizens of different States, as Smale, the tenant, was a citizen of the State of Illinois at all times during the pendency of this suit, the plaintiff was a citizen of the same State, and Smale's interests and Jordan's are so far joint

that there could not be said to be a separable controversy between the landlord, Jordan, and the plaintiff.

Sloane v. *Anderson*. 115 U. S. 275.

If this be considered a case arising under the laws of the United States, then, under the language of the first clause of section 2, either party may remove such a suit, and the fair intendment is that all of the defendants, or all of the plaintiffs so entitled should join in the application. That was not done in this case, the application being made by Jordan alone.

It is thought that the court below was without jurisdiction to hear this case.

Respectfully submitted,

WILLIAM M. BOOTH,
JAMES S. HARLAN, and
S. S. GREGORY,
Counsel for plaintiff in error.

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Office Supreme Court U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

CHARLES H. MITCHELL,
Plaintiff in Error,
vs.
JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT AND CONRAD N. JORDAN,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM PRESCOTT,
ATTORNEY FOR PLAINTIFF IN ERROR.

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In Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

This is an action of ejectment, originally instituted in the Circuit court of Cook county, Illinois, and afterwards removed into the Circuit court of the United States for the Northern district of Illinois.

The controversy in the suit, on the merits, concerns the possession and title of a tract of land situate in Cook county, Illinois, described as the fractional south-west quarter of fractional section 20, township 37 north, range 15, east of the third P. M.

The township was originally surveyed by the general government in the years 1834–5.

It is rendered fractional by the boundary line between the States of Illinois and Indiana and Lake Michigan on the east and north, and by the Indian boundary line on the north-west.

Within this township lies in part—the other part being in the State of Indiana—a small lake, the extent of which in Illinois is about two miles in length by about one and a half miles in breadth, that portion lying in Indiana being of slightly larger area, and at the time of the survey was denominated by the surveyor, "Navigable Lake."

This lake is connected with Lake Michigan by two natural outlets, one through Wolf river, in Indiana, and the other through the Calumet river, in Illinois.

Plats of the survey of the township were constructed and deposited in the usual manner, in the offices at which the lands were afterwards to be disposed of—one at the local land office at Chicago, and one at the General Land office, by which plats the local and general land offices were governed in the disposition of the lands of said township. (Printed record, pp. 30, 60.)

By these plats it appears that the south-west quarter of fractional section 20 of said township (being the land in controversy) is rendered fractional by this small lake; that all the land embraced within the south-west quarter of said section is in *one body*, bounded on the south-west by the water of said small lake, and the contents thereof estimated to be 4.53 acres: At this survey the whole of said lake was meandered, and the record thereof, so far as it relates to the land in question, is as follows:

Meanders of lake margin through sections 19 and 20, township 37 north range, 15 east 3rd principal meridian.

Thence from said corner to fractional sections 19 and

30, along south-western margin of lake, along fractional section 19, township 37, north, range 15 east of the 3rd principal meridian, as follows, viz. :

N. 20° E. 15.00 chains
N. 25° E. 15.00 "
N. 28¾ E. 35.10 " to the corner to sections 19, 20, township 37, north, range 15 east; land 1st 15.00 chains 1st rate soil, well timbered with white, yellow, and burr oak, hickory, lynn, etc., undergrowth hazel and briars.

* * * Thence from said corner to fractional sections 19, 20, along the northern margin of lake along fractional section 20, township 37 north, range 15 east of the 3rd principal meridian, as follows, viz. :

N. 85° E. 10.00 chains
S. 70° E. 10.00 "
S. 55° E. 10.00 "
S. 20° E. 15.00 "
S. 80° E. 10.00 "
S. 60° E. 14.00 "
S. 46° E. 11.60 "
S. 41° E. 2.00 " to the temporary post set by me on the line between Indiana and Illinois, at the intersection of said line with the lake. Land all marsh ; water from 6 inches to 3½ feet deep.

June 17th, 1834.

Resurvey of the Meanders of Lake through Section 20, T. 37, R. 15, E.

Commenced at the corner of the fractional sections 19 and 20, township 37 north, range 15 east ; thence with the meanders of the northerly margin of the lake, along fractional section 20, township 37 north, range 15 east of the 3rd principal meridian, as follows, viz. :

N. 85° E. 10.00 chains
S. 70° E. 10.00 "
S. 55° E. 10.00 "
S. 20° E. 15.00 "
S. 80° E. 10.00 "
S. 60° E. 14.00 "
S. 46° E. 11.60 "
S. 41° E. 2.00 " to the state line between Indiana and Illinois; 60.25 chains south of 156 mile corner at said intersection set post for corner to fractional section 20, township 37, north, range 15, east of the third principal meridian. I found the water here too deep to raise a mound.

March 5, 1835.

JOHN A. CLARK.

It would appear, however, that the form and contour and area of the said tract of land is not precisely as shown upon the said plats, but is in fact a somewhat long and narrow strip or tongue of land, about 150 rods long, projecting in a south-westerly direction through the lake, and contained, at the time of the trial below, about twenty-five acres of dry land.

It appears the water of this lake is subject to fluctuation from several causes; that it is influenced by the rise and fall of Lake Michigan, and that at times of high water the waters of this lake extend to and beyond the limits it occupied at the time of the original survey.

It further appears that a level of Lake Michigan has been adopted in surveys in Cook county, called datum; that the extreme rise and fall of Lake Michigan is from five feet above datum to one foot below; that the average level of water in Lake Michigan is about 1.8 feet above datum; that the level of water in said small lake, when

LAKE MICHIGAN
7
8
18
17
19
20
31
32
River
Calumet
STATE ILLINOIS LINE
INDIANA
Wolf River
LAKE
LAKE GEORGE

the same reaches the level existing at the time of the original survey in 1834–5, is 2.2 feet above datum, and four-tenths feet above the average level of Lake Michigan, thus making the tract subject to change in form and area according to the existence of the different stages of water; the general form thereof, however, is shown with substantial correctness by the accompanying diagram.

It further appears that the lake is not "navigable," as that term is interpreted by the courts of Illinois, nor is it navigable in fact, except for very small boats in high stages of water.

On the 1st day of March, 1850, having previously entered and purchased the same at the local land office at Chicago, Horatio B. De Witt received a patent, in due form, for the said tract, the description thereof, in said patent, being as follows: * * * The south-west fractional quarter of fractional section 20 in township 37 north, range 15, in the district of lands subject to sale at Chicago, Illinois, containing 4.53 acres, according to the official plat of the survey of the said lands returned to the general land office by the surveyor general. * * * Afterwards, and previous to the commencement of this suit, plaintiff in error became the owner thereof in fee simple, taking whatever title thereto De Witt acquired by his said patent.

In the year 1874, or forty years after the survey was made, and twenty-six years after the issuance of the patent to De Witt, the commissioner of the general land office—being also *ex-officio* surveyor general, as to the territory in which this land is situated—caused another survey to be made, which purported to be a survey of the *bed* of the lake—then denominated "Wolf Lake."

This survey was made under the provisions of the following circular issued from the General Land Office July 13, 1874:

CIRCULAR INSTRUCTIONS.

For surveying beds of meandered lakes, etc., in districts where the office of surveyor general has been discontinued.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., July 13, 1874.

As inquiries arise in regard to the survey of the beds of meandered lakes or other similar bodies of water in districts where the office of surveyor general has been discontinued, the following is communicated as defining the conditions under which such lake beds are regarded as surveyable, and as giving the proper mode of proceeding to have the same surveyed and to obtain title thereto.

The beds of lakes, (not navigable) sloughs and ponds over which the lines of the public surveys were not extended at the date of the original survey, but which from the presence of water at the date of such survey were meandered, are held to be the property of the United States; and whenever, by evaporation or the operation of any other cause, natural or artificial, the waters of such lake, slough or pond, have so permanently receded or dried up as to leave within the unsurveyed area dry land, fit in ordinary seasons, for agricultural purposes, such dry land is subject to survey and sale under the general laws regulating the disposal of the public domain.

Such surveys will be ordered, and, upon approval, disposition proceeded with in the following cases:

1st. Where the waters have so far permanently receded or disappeared, as to permit, during the ordinary surveying season (not on the ice) the actual extension of the lines of survey, and the establishment and marking of corners in the manner required by law, over the whole area of the bed of such former lake.

2d. Where the waters have not generally disappeared but where they have so far permanently receded as to leave a margin of dry land fit for cultivation between the original meandered lines and the remaining waters, of sufficient area to admit of the survey and of the establishment of at least three corners of a quarter section.

3d. The commissioner of the general land office will consider the question of ordering a survey of margins not admitting the laying off of one hundred and sixty acres but not less then forty acres.

Parties desiring the survey of such lands may make application in writing to the Commissioner of the General Land Office therefor, stating the approximate area and the situation of the tract with reference to the said section township and range of the public surveys, the same to be illustrated by a diagram; the fact that the waters have disappeared in the manner, or to the extent as specified in one of the three several above specified cases—such statement to be accompanied with the affidavit of at least two credible and disinterested witnesses as to the disappearance of the waters, the probable quantity of land capable of being surveyed in the whole area lying between the original meandered line and the then margin of the waters, and showing what proportion of such area is fit for agricultural purposes.

To insure prompt attention and decision by this office both the statement and affidavits required must be *full and specific.*

If upon examination of such statement, diagram and proof it is found that such survey may be properly allowed, the parties applying will be so notified, and upon their designating to this office the name and residence of some competent and reliable surveyor, together with a statement from him in writing of the amount for which he is willing to execute the field work of the survey, and a certificate of some United States depositary that the amount specified has been deposited to the credit of the United States "on account of individual depositors," the commissioner will then issue the necessary instructions to the surveyor to enable him to execute the field work in accordance with the public land system.

To correct what seems to be a very general misapprehension as to the manner in which persons may proceed to perfect title who have made actual settlement on lands of the character herein designated and who claim or propose to claim under the preemption laws of the United States, it is remarked that in no event and at no stage of the proceedings can their declaratory statements be received or filed in this office, such declaratory statements must be filed in the local land office and cannot be there received until after such survey has been made and the approved plat thereof filed in the local office.

It is proper to further state that the fact of having borne the expense of survey will give no priority of claim or right, under existing laws, to purchase the land, or in any manner affect the vested interest of any party thereto, should such exist, as the land, when surveyed, will be subject to disposal according to the laws of Congress and the regulations of this office relative to the disposal of lands embraced in fragmentary surveys.

In case the lake bed is small, and is so situated that no

township, section or quarter section corners will need to be established by reason of such lake being situated within a given section or sections fully surveyed, no deposit will be required; and upon proof being furnished this office as above, of the disappearance of the water, the premises will be platted, and the land can then be disposed of under existing laws.

S. S. BURDETT,
Commissioner.

It appears this survey was brought about through an application to the Commissioner of the General Land office, by several persons, including one Alice Condit, setting forth, in substance, that the lake had decome dry, and its bed fit for cultivation, with a request for a survey of "Wolf Lake bed." The survey was made and approved as that of the bed of a lake covered with navigable water at the time of the original survey, segregated from the surveyed public lands by the meandered lines of that survey, and consequently excluded from the operation of laws granting and providing for the disposal of public lands while so designated a body of navigable water, and as lands which had come into existence subsequent to the original survey of the lake and adjacent lands. (Printed record, p. 60.)

In making this survey the border waters of the lake were ignored, and the short steps or traces taken by the surveyor in the process of meandering the lake originally —as indicated by the field notes—adopted as the boundary line. Upon the completion of this survey a plat was also constructed therefrom, from which it appears that within the description "fractional south-west quarter of fractional section 20," etc., three several tracts are laid off,

viz.: the west half of the south-west quarter, the south-east quarter of the south-west quarter, and lot 2 of the south-west quarter of said section 20. (Printed record, Deft.'s exhibit 5, p. 41.) These tracts, or some portions thereof, embrace a large proportion of the strip of land so patented to DeWitt, and now claimed by the plaintiff in error in this suit. These tracts, with the exception of said strip, are substantially all submerged and unfit for cultivation.

Immediately after this survey was concluded, claims were set up to the lands so laid off as aforesaid, and indeed to all the lands embraced by said survey, by divers persons under various claims and laws; Alice Condit claimed the land in question under the pre-emption laws. The Commissioner of the General Land Office thereupon instructed the officers of the local land office at Springfield, Illinois, all the land offices in the State of Illinois having before that time been consolidated into that one, to notify all claimants for the lands of a day set for hearing testimony regarding such claims, and after such hearing, to transmit all the proceedings with their joint opinion thereon to the general land office. Such hearing was held on the 8th day of February, 1875.

DeWitt appeared at this hearing and raised certain objections to the said proceedings, and asserted his claim to the land in question by virtue of his patent, which claim, without their opinion was referred by the local officers to the commissioner of the general land office for his action thereon, his claim being by that officer denied, DeWitt appealed to the secretary of the interior, and on May 4th 1880, that officer affirmed the action of the Commissioner of the General Land Office, denying the claim of DeWitt in the premises.

On the second day of July, 1881, a patent for the lands last described and so laid off under the second survey was issued to said Condit, and five days afterwards she conveyed the same to one, Joseph P. Ord, and on the 4th day of October, 1882, Ord, joined by defendant in error, John I. Bennett, and Henry M. Alexander, and Henry Day of the City of New York, conveyed the same, together with other lands embraced by the said second survey, by a quit claim deed, to defendant in error, Conrad N. Jordan, subject to certain rights of Bennett therein stated.

Afterwards and prior to the commencement of this suit the defendant, Jabez G. Smale, went into the possession and actual occupancy of the strip of land claimed in this suit, as tenant of defendant, John I. Bennett, and afterwards and prior to the commencement of the suit, became the tenant of Jordan.

On the 9th day of November, 1882, plaintiff in error instituted this suit in the Circuit court of Cook County, Illinois, against the defendants, Smale, and the two Bennetts, (all these defendants as well as the plaintiff being citizens of the State of Illinois.)

The declaration was in the usual form, addressed to the November term of the court, and was filed in due time to call for plea or demurrer at that term.

On the 2d day of December, 1882, the then defendants filed their demurrer to the declaration, and, on the same day, Conrad N. Jordan entered his *conditional* appearance, and also, on the same day, entered a motion to be made *sole* defendant in the cause, in place of Smale and the Bennetts; that motion being denied by the court, Jordan, on the same day, moved to be admitted to defend as landlord, and co-defendant with Smale and the Bennetts, which motion was allowed by the court.

On the 14th day of December, 1882, Jordan presented his petition for the removal of the cause under the provisions of the act of congress of March 3, 1875, into the Circuit court of the United States for the Northern District of Illinois.

On the 23d day of January, 1883, Jordan, by leave of court, filed an amended petition for removal.

On the 26th day of February, 1883, the removal was accomplished, and a copy of the record was filed in the Circuit court.

On the 15th day of March, 1883, plaintiff in error, appeared in the Circuit court, and entered his motion to remand the cause to the State court; that motion being argued and denied, plaintiff asked and obtained leave to amend his declaration, and pleas of the general issue being interposed, and the usual stipulation in writing having been duly entered into providing for a trial of the cause by the court, without the intervention of a jury, a trial was accordingly had by the court, and concluded on the 30th day of July, 1885.

On the 19th day of January, 1886, the plaintiff renewed his motion to remand the cause to the State court, and the defendant, Jordan, entered a cross motion to be substituted as sole defendant in the cause; both motions were overruled by the court.

On the 1st day of February, 1886, the court made, and ordered filed, the special findings therein—such portions thereof as are deemed necessary to be recited here are as follows:

CLAUSE 2. That the remote grantor of the plaintiff, Horatio B. DeWitt, entered and purchased from the United States the tract of land embraced in said survey,

and shown upon said copy of plat as number 27185; (plaintiffs exhibit B, Printed record, p. 30,) and that afterwards and on the 1st day of March, 1850, the proper officers executed and issued to said Horatio B. DeWitt a patent for said land in the usual form, in and by which the land so purchased is described as follows to wit: The south-west fractional quarter of fractional section 20, in township 37, of range 15, in the district of lands subject to sale at Chicago, Illinois, containing four acres and fifty-three hundreths of an acre, according to the official plat of the survey, of the said lands returned to the general land office by the surveyor general, which said tract has been purchased by the said Horatio B. DeWitt

CLAUSE 3. That at the commencement of this suit the plaintiff through *mesne* conveyances, had acquired and held the title in fee simple to the lands so conveyed by the United States to said Horatio B. DeWitt, under and by virtue of said patent.

That from the main land north of the east and west half section line of said section 20, running across said fractional south-west quarter of section 20 as patented, there is a ridge or elevation of land extending in a south-westerly direction; said ridge or strip of land thus projecting southerly as aforesaid being of varying width and elevation, and timbered with oak, hickory, elm, ash, poplar, linden and hackberry, three feet in diameter and under, the width of said ridge limiting it to dry land at ordinary stage of water, being over 28 rods at the north and of varying width, being at some places slightly wider and at some narrower, extending to a natural depression about 150 rods south of said half section line, said depression being about one chain wide, through which the waters flow at a high stage.

CLAUSE 4. That from thence south the general character of said ridge is the same, but slightly narrower and lower, a distance of about 80 rods, at the last-named point said ridge disappearing, and from there to a point south about 80 or 90 rods the bed and growth are of the same general character, as the bed and growth along the margin of the lake, and on either side of the ridge reeds and coarse grass growing in the water, and there being nothing but such growth to obstruct the flow of water from one side to the other, the depth at this point being sufficient at high water to enable skiffs and small boats to be rowed through from one side to the other, the water west having for many years been known as Hyde Lake in ordinary speech, while that to the east has been currently known as Wolf Lake, said space or distance last described being marsh land at low water; that at the south limit of the space last described is a small body of land, known as Elm Island or Fogli's Place, of the extent of 1½ or 2 acres, upon which timber grows of the same character as that on said ridge; to the south of which for about 50 rods there is water at high stages and marsh at medium stages, at which point or distance the ridge appears again as dry land about 30 rods a little east of north from the north point of the meander line of the point of land comprising fractional section 29, etc.; that upon either side of the dry land of said ridge and in the space above described, south of Elm Island, the vegetation assumes a marshy appearance, weeds and coarse grass growing in the water of uniform character and extending in width 20 to 25 rods east and west.

That at the time said meandered line was run there were growing along and near the course thereof numerous large trees of different varieties on either side thereof,

and that the elevation of the ridge at the meander line averaged about 4 feet above the level of the water at the time said meander line was run; that the physical conditions of the land and water are substantially what they were at the time of the original survey, and that said lake or lakes are non-navigable waters; that the south line of said section 20, if full and projected through the water, would intersect the lower end of the ridge about 80 rods north of its south-west extremity.

CLAUSE 5. At the time of said government survey there was a natural outlet for said lake or lakes towards the north-east into Lake Michigan through Wolf river, said river being about 1½ miles long and from 5 to 14 feet in depth; but such outlet was and has continued to be subject to interruption by the formation of a sand-bar across the mouth thereof upon the shore of Lake Michigan. There was also an outlet from the westerly portion of said lake or lakes into the Calumet river, shown on said plat as Little Kalamick, said outlet into the Calumet river running in a westerly direction through the fractional north ½ of said section 30 to its connection with said Calumet river.

CLAUSE 6. The level of water in said lake or lakes is subject to fluctuations alike from the operation of the change of the level of Lake Michigan from storms, winds, etc., and also from the operation of rains, thaws, evaporation, etc.; but said lake or lakes is or are occupied by permanent water, and substantially the entire bottom thereof is below the mean level of Lake Michigan, and the greater portion of it is below extreme low water in said Lake Michigan, so that said lake or lakes never become entirely dry, nor has any considerable portion thereof within its margin, as shown by the said government plat, ever

been fit for cultivation, except as to said Elm Island and said ridge hereinabove described.

CLAUSE 7. That at times of high water, however produced, the water in said lake or lakes extends to and beyond the limits that it occupied at the time of said government survey; that a level of Lake Michigan has been adopted in all surveys in Cook county, called datum; that the extreme rise and fall of Lake Michigan is from 5 feet above datum to one foot below datum; that the average level of water in Lake Michigan is about 1.8 feet above datum; that the level of water in said lake or lakes, when the same reaches the level existing at the time of the government survey of 1834 and 1835, is 2.2 feet above datum and .4 feet above the average level of Lake Michigan.

CLAUSE 8. That the lakes and lands not embraced in the original survey; that is to say, all the lands, swamp, as well as those covered by water, including the ridge, which are outside the meandered line, run around said lake or lakes, the Commissioner of the General Land Office caused to be surveyed in 1874; that after such survey was made, the United States by its proper officers, sold to Alice A. Condit the west half of the south-west quarter, the south half of the east half of the south-west quarter, and lot 2 of the south-west quarter of fractional section 20, T. 37 A. R. 15 E. of the 3rd P. M., and issued to said Alice A. Condit patents in the usual form, for said lands, and that the defendant, Conrad A. Jordan, is the owner by *mesne* conveyances of the lands so patented to said Condit; that Horatio B. De Witt, owner of the fractional S. W. ¼ of fractional sectional 20, in the original survey contested before the proper officers of the Land Department, the right of the United States to sell and convey title to said lands, under said second survey,

which contest was decided against the said De Witt by the Secretary of the Interior on appeal, and in favor of the right of the United States to sell said lands under said survey.

CLAUSE 9. That said meandered line, as it was originally run across said ridge from a point one chain east of the meander corner on the west, and, as is now adopted by the court as a line of boundary, is entirely above the water, except where said line intersects the east line of the fractional quarter section, to which point the water of Wolf Lake may possibly reach at high stages, and that at ordinary stages the waters approach to within four or five chains of said point. That as a matter of fact, the value of the lands sought to be recovered by the plaintiff herein and described in plaintiff's declaration, but for which the court refuses him judgment, exceeds the sum of $5,000.

CLAUSE 10. That the plaintiff's lines of boundary are the east line of the fractional south-west quarter of fractional section 20, township 37 N. R. 15, east of the third P. M. on the east; the north line of said fractional south-west quarter of fractional section 20 on the north, and the meander line, as originally surveyed and run across, and upon said fractional south-west quarter of said fractional section 20, upon the south and west, and that the same contains four acres and fifty-three hundreths of an acre, and as to said lands, so lying within said boundaries, the court finds the defendants guilty of unlawfully withholding the possession thereof from the plaintiff, and as to any and all and every the other lands claimed or demanded by the plaintiff, by his pleadings herein, the court finds the defendants not guilty.

On the same day the court rendered the following judgment:

Now come the parties by their attorneys and the court having considered and being now fully advised upon the matter herein upon the merits, finds the defendants guilty of unlawfully withholding from the possession of the plaintiff the following lands mentioned and described in the plaintiff's declaration, to wit: The southwest fractional quarter of fractional section 20, Tp. 37, N., R. 15, E. in the county of Cook and state of Illinois, as patented by the United States to Horatio B. De Witt, under patent dated March 1, 1850, and containing four acres and fifty-three hundreths of an acre. The court further finds that the plaintiff has established title in fee simple to said lands in the plaintiff and assesses his damages at one cent, and that the boundary of said described land does not extend beyond the meander line of the original survey thereof, by the United States. As to all the rest and residue of the lands and tenements described in the plaintiff's declaration, the court finds the defendants not guilty. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of and from the defendants the possession of the said first described lands according to the force, form and effect of his said recovery and that he have a writ of possession therefor, and that the plaintiff also have and recover of said defendants the said sum of one cent, his damages, together with his costs in this behalf expended, amounting to ——— dollars and ——— cents, and that he have execution therefor.

No opinion by the court was delivered in the case.

On the 11th day of January, 1887, a writ of error returnable to the October, 1887, term was sued out by plaintiff in error, and the cause removed into this court.

The Illinois statute of ejectment as to the pleadings provides as follows: "The defendant may demur to the declaration as in personal actions, or he shall plead the general issue, which shall be, that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff as alleged in the declaration, and the filing of such plea, or demurrer, shall be deemed an appearance in the cause, and upon such plea, the defendant may give in evidence any matter that may tend to defeat the plaintiff's action * * *

Rev. Stat., chap. 45, Tit. Ejectment; Starr & Curtiss' Stat., Vol. 1, p. 985.

The statute further provides:

That if the verdict be for a part of the premises described in the declaration, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the description of the premises claimed. *Ibid*, p. 987.

During the progress of the trial, defendants contended that the surveyor in making the original survey, did not in fact meander the lake, but did run a meander line or lines, over, across, and upon the said land surrounding the lake, and that as to the said strip of land in controversy, these meander lines were so run, as to include within them 4.53 acres and no more, and that said meander line or lines without reference to the situation or proximity of the lake or the waters of the lake, formed the boundary of said tract on the south and west sides thereof; and that the remainder of the fraction was omitted from the original survey, and that the title thereto did not pass to De Witt under his patent, but remained in the United States.

It was further contended, that as De Witt had appeared at the local land office at Springfield, at the "Hearing" before the officers at that office, on the 8th of February, 1875, and asserted his right to the land, which was denied by the Commissioner of the General Land Office, as before stated, and upon appeal to the Secretary of the Interior the action of the Commissioner affirmed, thus again denying his claim thereto, that De Witt was thereby barred from making further claim to the land, and that, as plaintiff in error had acquired his title thereto, subsequent to the actions and decisions of these officers; that he also is bound thereby, that the matter is *res judicata* as to both De Witt and plaintiff in error.

To maintain their position, defendants, during the trial, offered in evidence three plats, respectively, marked Exhibits 4, 4½ and 5 (Printed record, pp. 36, 41).

Also the oral evidence of Sylvester N. Howard, Charles B. Voday Charles J. Vilein, John A. Cole and Thomas Gaughan.

Also copies of the patent to Condit, the deed from Condit to Ord, and the deed from Ord, Bennett, Day, and Alexander to Jordan, also exemplified copies of the decision of the Commissioner of the General Land Office, of date February 12, 1878, also exemplified copies of the decisions of the secretary of the interior dated respectively May 4, 1880, August 24, 1880, May 16, 1881 and April 28, 1881, marked defendants exhibits 6, 7, 8, 9, 10, 11, 12 and 13. (Printed record, pp. 48 to 70, inclusive.)

The usual objections being made to the introduction thereof by plaintiff, and the same being overruled, exceptions were taken and preserved in the bill of exceptions (Printed record, pp. 36 to 72 inclusive.)

Assignment of Errors.

The plaintiff in error says that the Circuit court in its proceedings and judgment in said cause, erred,

First. In overruling the several motions of the plaintiff in error to remand the cause to the State court,

Second. In admitting the testimony of the witnesses Howard, Voday, and Vilein, the object and purpose of which was to show that they had traced or located the meander line as originally run by the surveyor in the original meandering of the lake, and marked the position thereof on the ground, according to the original field notes, their testimony being, respectively in substance, as follows:

My name is Sylvester N. Howard. I am a surveyor. In 1884 I was a member of the firm of Greely, Carlson & Co., Surveyors.

Thereupon the defendant's counsel examined the witness, as follows:

Q. State, Mr. Howard, whether you at any time, ran out the meander line about "Hyde Lake," and especially on the west side of said lake on sections 19 and 30, and between Hyde and "Wolf Lakes" on Section 20?

A. Yes, sir, I have.

Q. Did you locate that meander line?

A. I did.

Q. Who accompanied and assisted you?

A. One of my assistants was Mr. Voday, the witness here.

Q. State what, if any, monuments or marks you placed on the sections commencing on the half section line of 30, running around to the half section line of 19?

A. There were stakes placed at all the angles of the meander line.

Q. Did your assistants see those stakes placed?

A. Yes, sir.

Q. How was it, on the south-west quarter of section 20?

A. There were stakes placed there, with possibly one exception.

Q. I enquire particularly as to the south-east corner of the south-west fractional quarter of section 20—a four acre and a half piece, approximately?

A. There was a stake placed—a cedar post—$14\frac{6}{10}$ feet west of the north and south quarter lines, and $375\frac{6}{10}$ feet south of the east and west quarter lines.

Q. Have you a transcript or plat of your surveys?

A. I have had a sketch from which the plat (Defendants' Exhibit No. 4) was made, that shows a stake 14 feet and $\frac{6}{10}$ west of the north and south quarter lines, and 375 feet and $\frac{6}{10}$ south of the east and west quarter line.

Q. Don't it show how far north or south of the meander line that would be?

A. It does not.

Q. What is your recollection or memory about that distance?

A. That I could not state, because the angles of the meander line would not come to the quarter line. I should say, approximately, that it was within 50 feet of the meander line.

By counsel for plaintiff on cross-examination.

Q. How did you find this meander line, as you call it, and did you run the line yourself personally?

A. Yes, sir.

Q. How did you find it?

A. How do you mean?

By the COURT:

Q. How did you locate it?

A. By latitudes and departures.

By plaintiff's counsel:

Q. Did you find any monuments fixed around on this line, indicating the points to which it was originally run?

A. There was a stake which, I suppose, was intended for this at the east line of section 19.

Q. Did you find any posts at the intersection of any of the angles around the line anywhere, except at the section lines?

A. There was one at this corner, what was intended to be that corner.

Q. That is another section line, is it not?

A. That is the section line between 19 and 30.

Q. Under whose direction did you fix these posts that you say you fixed?

A. Under the direction of Mr. Bennett.

Q. Who were present with you in making this survey so far as it relates to section 20.

A. My assistants and Mr. Bennett was on the grounds, but not along with us all the time.

Q. It was under his direction that you ran the meander line and fixed it?

A. Yes, sir.

Q. There were trees growing along the course of the meander line on the S. W. ¼ of section 20, were there not?

A. Yes, sir.

Q. Did you find any marks on the trees, whatever, indicating these angles?

A. I did not.

Q. Did you make the map or plat Defendant's Exhibit 4?

A. I did not make the map or plat. I don't know anything about the lines on the plat; I only state with reference to the lines on the grounds.

By Mr. Bennett for defendant:

Q. Has Mr. Greely, your partner, had experience in matters of this kind?

A. He is an old surveyor.

Q. Was any of this work done in the office in connection with the Government notes or otherwise?

A. Well, it was all talked over with him, and the latitudes and departures were all calculated by him. He assisted me in the mental work. He calculated the latitudes and departures for these courses in the office, from copies of the government notes.

Q. Did you find the section corners of 31 and 32?

A. Yes, sir.

Q. State what you found—what points you found to identify and confirm you that you were right in reference to the meander line.

A. You mean what old monuments I found?

Q. Yes, sir; anywhere in the meander?

A. I think there were no old monuments at all at this corner, except that I put there myself. The corners of Sec 31, 32, 29 and 30 I fixed, and placed a stone there, and this meander corner was fixed with reference to that.

And the said CHARLES B. VODAY testified as follows:

By Counsel for Defendant.

Q. State whether you ever at any time in 1884 assisted Mr. Howard in locating the meander line at Wolf Lake.

A. Yes; I worked all the time with Mr. Howard on the whole survey.

Q. Were you with him when he located any points, drove any stakes or fixed any monuments in that work?

By the COURT: State if you were present at the time this line was run by Mr. Howard—where you planted any stakes, if you planted such stakes.

A. I think we put stakes on the north—made angles on the meander.

By Defendant's Counsel.

Q. Did you show to Mr. Vilein any of those stakes that Mr. Howard placed on the line which he ran?

A. Yes, sir; I did.

By Counsel for Plaintiff.

Q. What were you doing in that survey:

A. Chaining.

Q. You ran in the direction he told you to and stuck a stake where he told you to?

A. Yes, sir.

Q. You don't know anything about where the meander line of that survey was actually located, do you?

A. No, sir.

Q. You simply ran the line under his direction?

A. Yes, sir.

And the said CHARLES J. VILEIN testified as follows:

By Defendant's Counsel.

Q. What is your occupation?

A. I am a surveyor.

Q. Are you acquainted with Hyde Lake and its surroundings?

A. Yes, sir.

Q. Has Mr. Voday (the witness here) ever pointed out to you and you put in stakes in what purported to be the meander line located by Mr. Howard?

A. Yes, sir.

Q. Where are they?

A. One was at Smith's house (on the west side of the lake) and the other on the ridge.

Q. When were you there taking elevations?

A. In September, 1884.

Q. Are you acquainted with the northeast part of the southwest quarter of section 20?

A. Yes, sir.

Q. Did you at any time put your levels over what was shown you as the meander line on the south line of that tract?

A. Yes, sir.

Q. Were you shown a stake near that meander line near the half section line?

A. No sir, I was not shown any stake.

Q. Was there anything shown you there to indicate the meander line.

A. There was a cedar post there at the east end of that line. A portion of the line was shown to me, and I afterwards found a brick that was placed there by Mr. Bennett, which agreed with the distance of the line.

Q. Did you have field notes with you and compare that?

A. Yes, sir.

Q. Did it correspond?

A. Yes, sir.

Q. Did you take levels over that land?

A. Yes, sir.

Q. Did you make notes and have you compared the figures placed on this map (deft's. Exhibit 4) with your notes, and are they correct?

A. Yes sir, they are correct.

Q. You mean you had the original survey field notes of the government?

A. Well, I had notes; I believe they were Mr. Greely's notes, and I also had certain government notes before that.

By Counsel for Plaintiff.

Q. In regard to this meander line, as you call it, you say you ran that (as I understand you) and found a brick somewhere. Can you point out on this plat (Deft's. Exhibit 4), where it was found?

A. Yes, sir.

Q. Where was it?

A. Right here (indicating).

Q. Who placed the brick there?

A. When I was along Mr. Bennett put the brick there or told me to put a brick there. It laid on the snow at the time Mr. Howard surveyed at the point.

Third. In admitting the testimony of the witnesses, John A. Cole and Thomas Gaughan, the object and purpose of which was to show that defendant's exhibit 4½, (Printed record, p. 41), correctly represented the relative position of the water of the lake to the meander line in

controversy and the topography and appearance of the surrounding lands and water at the date of the survey upon which the same was constructed in the month of January, 1883.

And the said John A. Cole testified, in substance, that the said plat, defendant's exhibit 4½, (Printed record, p. 41), correctly represented the relative position of the water of the lake to the meander line in controversy and the topography and appearance of the surrounding lands and water at the date of the survey upon which the same was constructed in the month of January, 1883.

The testimony of Gaughan was substantially the same as that of Cole, except as follows:

Q. (by counsel for defendant). Have you seen this map?

A. I saw it; was looking at it. The south end is pretty correct, but the north end is a little more rounding.

Q. But excepting that it seems to you to be fairly accurate?

A. Yes, sir.

Fourth. In permitting defendants to introduce in evidence the plat Exhibit 4, (Printed record, p. 36), the object and purpose of which among other things was to show the courses and location of said meander line as part boundary of the land in question in accordance with the tracing and location of the original meander line as run and marked by the witnesses Howard Voday and Vilein.

The plat, Exhibit 4½, (Printed record, p. 41,) the object and purpose of which among other things was to show the relative position of the water of the lake to the meander line, and the topography and appearance of the surrounding lands and water at the date of the survey

upon which the same was constructed in the month of January, 1883.

The diagram Exhibit 5, (Printed record, p. 41), the object and purpose of which was to show the extent and character of the survey of 1874.

The Exhibits 6, 7, 8, 9, 10, 11, 12 and 13, (Printed record, pp. 48 to 70), the object and purpose of which was to show that the rights of DeWitt in the premises had been adjudicated by the land department.

Fifth. In finding and adjudging the defendants guilty of unlawfully withholding from the possession of the plaintiff a part only of the land claimed by the plaintiff to wit: four acres and fifty-three hundreths of an acre.

Sixth. In not adjudging the boundary of the plaintiffs' land on the south to extend at least to the depression as found by the special finding at clause three thereof.

Seventh. In adjudging the plaintiff entitled to recover a part only, to wit: four acres and fifty-three hundreths of an acre of the tract claimed by plaintiff as described in the third count of his declaration. Printed record, p. 23.

Eighth. In adjudging that the boundaries of the plaintiff's land does not extend beyond the meander line, as interpreted by the court and found by the ninth and tenth clauses of the special findings and limited to four acres and fifty-three hundreths of an acre.

Ninth. Because the judgment is not supported by the facts found by the court.

Tenth. Because the description of the land awarded to the plaintiff in and by the judgment is indefinite, insufficient and void.

Brief and Argument for Plaintiff in Error.

Three principal questions arise for discussion:

First. Was the suit properly within the jurisdiction of the Circuit court.

Second. Did all the land that lies within the description—fractional southwest quarter of fractional section 20, township 37, north, range 15, east of the 3d P. M., pass to DeWitt under his patent, regardless of acreage; or only a fraction of the tract equal to four and fifty-three hundreths of an acre.

Third. Do the facts of Horatio B. DeWitt appearing at the land office at Springfield and claiming the land as his own, and contesting the right of the United States to sell and convey title to the same under the second survey, the ruling and decision of the commissioner of the general land office and that of the Secretary of the interior deny his claim constitute a bar to the right of the plaintiff in error to claim and recover the same in this proceeding.

I.

As to the jurisdiction of the Circuit court.

The proceedings for "removal" were based upon the 2d section of the act of March 3, 1875, relating to the jurisdiction of the Circuit courts of the United States and to regulate the removal of causes from State courts, etc.

The original petition for removal was filed on the 14th day of December, 1882. (Printed record, p. 13.)

On the 15th day of January thereafter, Jordan obtained leave of the court to amend his petition.

On the 23rd day of January the amended petition was filed (Printed record, p. 13), and is as follows:

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

CIRCUIT COURT, JANUARY TERM, 1883.

Charles H. Mitchell, *plaintiff*, *vs.* Jabez G. Smale, John I. Bennett, Frank I. Bennett, Conrad N. Jordan, *defendants*. } *Petition for removal to the Circuit Court of the United States for the Northern District of Illinois.*

To said Court:

Your petitioner respectfully shows to this honorable court, that the matter and amount in dispute in the above entitled suit exceeds the sum or value of five hundred dollars, exclusive of costs.

That the controversy in said suit is between citizens of different states, and that the petitioner, who is defendant, was at the time of the commencement of this suit, and now is and at the time he became such defendant, was a citizen of the state of New York; that neither said John I. Bennett nor said Frank I. Bennett were, nor were either of them in possession of said lands described in said declaration at the time of the commencement of said suit, nor have they or either of them since been in possession thereof, nor did they or either of them own said real estate or any portion thereof, at the said time of the commencement of said suit, nor have they or either of them since acquired title thereto; that they are unnecessary and improper parties defendants to said suit; that said defendant Jabez G. Smale, was at the time of commencement

of this suit, the tenant of petitioner; that petitioner is the owner of the legal title to said land; that petitioner was admitted as defendant in said cause to defend as landlord on the 2d day of December, A. D., 1882; that subsequent thereto and on the 19th day of January, 1883, and after the said suit became a *lis pendens* as against petitioner, the said Jabez G. Smale, by agreement with petitioner, surrendered and cancelled the lease of said lands involved in this suit, which he held at the time of the commencement of this suit, and received and executed and entered into a new lease from and with petitioner, of all the lands involved in this suit of the said date, in place of the said original lease in force when this suit was commenced.

That in and by the said new and substituted lease the said Smale expressly agrees to hold said premises subject the *lis pendens* of this suit as against petitioner and to abide by any final judgment which may be rendered in this suit against petitioner and to be subject to any process which may be issued thereon, and that he, the said Smale, hath no rights under said substituted lease to the premises therein contained after any such final judgment against petitioner shall have been rendered.

Your petitioner states that said suit is one arising under the laws of the United States in this, to wit: that plaintiff seeks in and by said suit to recover lands embraced in a survey of pnblic lands made by the government of the United States in 1874, embracing a part of said section 20, Tp. 37 N. R., 15 E., 3d P. M. in Illinois, and patents issued under said survey under which your petitioner deraigned title in fee simple before the commencement of said suit, and in him vested by conveyance from the patentee.

That the plaintiff claims that he is seized of the frac-

tional tract described in the declaration as the grantee of Horatio B. DeWitt that the said survey patents and deeds to petitioner are not made in pursuance of the acts of congress and laws of the United States relating to the surveying and disposition of the pubiic lands of the United States, and that said act of Congress and laws have been misconstrued by the said land department and disregarded, and that said survey, patents, deeds, and the proceedings of the land department are illegal and void, and in violation of the contract rights of said Mitchell under the laws of the United States; that by virtue of the alleged ownership of said fractional tract described in the declaration he, the plaintiff, under and in pursuance of said act of Congress and laws of the United States, is also the owner of said lands so owned by your petitioner by virtue of said survey of 1874, and patents and deeds thereunder. This petitioner claims title in fee to said lands other than said fractional tract by virtue of said survey of 1874, said patents and deeds issued thereunder in pursuance of the act of Congress aforesaid, and laws of the United States, and therefore states that said suit is one arising under the laws of the United States entitling this petitioner to a removal of the suit under the act of Congress entitled "an act to determine the jurisdiction of the "Circuit courts of the United States and to regulate the "removal of causes from the State courts, and for other "purposes," in force March 3, 1875, for that cause alone.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said Circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said Circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said Circuit court of the United States in and for the Northern district of Illinois, and he will ever pray.

CONRAD N. JORDAN, *Petitioner.*

This petition was accompanied by a bond, which was finally made satisfactory to the court and no objection is now urged because of its insufficiency.

It was upon this amended petition that the proceedings for removal were had.

Not deeming these proceedings sufficient either in form or substance to deprive the State court of, and invest the Circuit court with jurisdiction, plaintiff interposed the objections in the State court appearing in the record (Printed record, 11, 12, 16, 17), and also entered and urged a motion in the Circuit court to remand the same to the State court. (Printed record, pp. 19, 20, 72.)

It is not entirely clear what particular grounds were relied upon for the removal. It will be observed that the petition first alleges diversity of citizenship. And second, that the suit is one arising under the laws of the United States, and that petitioner is entitled to a removal *for that cause alone.* Assuming that both grounds will now be urged, to maintain the jurisdiction of the Circuit court, both are here considered.

I. THIS IS NOT A CONTROVERSY BETWEEN CITIZENS OF DIFFERENT STATES, NOR ARE THE FACTS SUFFICIENTLY SHOWN TO AUTHORIZE THE REMOVAL UPON THAT GROUND ALONE.

The Illinois statute of ejectment bearing upon the question of parties defendant, is as follows:

"If the premises for which the action is brought are "actually occupied by any person, such actual occupant "*shall* be named defendant in the suit, and all other per- "sons claiming title or interest to or in the same, may "also be joined as defendants."

Starr & Curtiss, Stat., 981, § 6.

"If the action is against several and the plaintiff is en- "titled to recover, he shall recover against all who are in "joint possession or claim the title, whether they shall "have pleaded separately or jointly."

Ibid, 987, § 28.

"If the verdict be for any plaintiff and there be several "defendants, the verdict shall be rendered against such of "them as were in possession of the premises, or as claimed "title thereto at the commencement of the action."

Ibid, 987, § 30, Sub § 3.

The suit was originally commenced by the plaintiff in error against Smale and the two Bennetts, all citizens of Illinois—Smale being the actual occupant of the premises, and the two Bennetts claiming an interest therein.

Smale was, therefore, a necessary party.

Merritt v. *Thompson* 13 Ill., 716.

Phelps v, *Oaks*, 117 U. S., 236,

And the two Bennetts, at least, proper parties defendant.

These three defendants came in and interposed a general dem urrer to the declaration, Printed record, p. 4, thus appearing and submitting to the jurisdiction of the court without objection.

Afterwards Jordan came and offered to enter his *conditional* appearance; that is to say, upon condition that he should be substituted as sole defendant in place of Smale and the Bennetts. (Printed record, p. 7.)

In support of his motion, Jordan presented to the court his affidavit, in substance as follows:

"Conrad N. Jordan, being duly sworn, says that the "said defendants, John I. and F. I. Bennett, conveyed the "property involved in the above entitled suit to affiant be- "fore said suit was commenced, and on the 1st day of "November, 1882; by deed dated and acknowledged of "that date, and in pursuance of a contract executed Sep- "tember 20, 1882; that at and prior to said last mentioned "date, said defendant, Jabez G. Smale, had been in pos- "session of a part of said premises; and on the 26th day "of October, 1882, entered into the possession of the res- "idue of said premises; that said Smale executed a writ- "ten lease as to the residue of said premises, October 26, "1882; that said leases were assigned to affiant, the one "on and the other before November 1, 1882, by John I. "Bennett, to whom they ran, and that when the said suit "was commenced, the said defendant, Smale, was the "tenant of affiant, and the said John I. and Frank I. Ben- "nett had no interest in said property, or any of it, or the "possession thereof, except as holding under affiant.

"Affiant therefore prays that he may be substituted "as sole defendant for the said John I. Bennett, Frank I. "Bennett and Jabez G. Smale, *his tenants as aforesaid.*

"CONRAD N. JORDAN."

(Printed record, p, 8.)

Unquestionably if Jordan had succeeded in his efforts to be substituted as *sole* defendant in the cause, prior to its removal from the State court, there would at once have arisen the requisite condition to a removal of the cause, upon the ground of citizenship alone. This motion being, however, denied, he then, *upon his own motion* became a *co-defendant* with the Bennetts and Smale. (Printed record, p. 8.) The case then stood as to parties, thus: Mitchell, plaintiff, a citizen of Illinois; the two Bennetts and Smale, defendants, citizens of Illinois; and Jordan, a co-defendant upon his own motion, a citizen of New York: Hence, unless the defendants, the two Bennetts and Smale, *each* and *every one* of them could, upon some ground, be put aside as mere nominal parties; obviously the case was not removable upon that ground alone. First treating the Bennetts as such nominal parties, the consummation of this purpose was evidently intended by the circumstances which afterwards took place, as related by the amended petition :

"After the suit became a *lis pendens* as against petitioner,"—to use the language of the petition—Jordan entered into an arrangement with the defendant Smale, the very object and purpose of which confessedly was, to so change the *status* of the parties, as to at once create the conditions necessary to render Smale an unnecessary party defendant, and oust the State court of its properly acquired jurisdiction.

Counsel submits that this course was entirely ineffective for the accomplishment of such purpose ; Smale still remained a necessary party-defendant.

Jordan was not a necessary party. When the landlord comes in and defends of his own motion in the action of ejectment under the statutes of Illinois, it is as co-defend-

ant. The statute provides: "Every tenant who shall "at any time be sued in ejectment by any person other "than his landlord shall forthwith give notice thereof to "his landlord or to his agent or attorney under the "penalty of forfeiting two years rent of the premises in "question or the value thereof, to be recovered by such "landlor d by action of debt, in any court having cogniz- "ance thereof."

Starr & Curtiss; Stat., 984, § 17.

On the receipt of such notice the landlord can appear and defend in the name of the tenant, or can have himself made *a co-defendant*.

(*Oetgen* v. *Ross;* 47 Ill., 142.)

Being admitted by the State court as a co-defendant Jordan could have defended the possession of Smale, and through that his own title, and he had thereby the right to control the defense as *dominus litis*, and to conduct such issues as his own rights and interests might dictate, and this need not arrest or interfere with the jurisdiction of the State court already established by the plaintiff against the tenant in possession. For such proceedings should be treated as incidental to the jurisdiction thus acquired and auxiliary to it.

Phelps v. *Oakes;* 117 U. S., 237, 240.

When Jordan came in as co-defendant it was upon his own motion and for his own interest, not because he was either a necessary or indispensable party.

Phelps v. *Oakes*; 117 U. S., 236, 239.

Nor was the petition sufficient in form.

Insurance Co. v. *Pechner*; 95 U. S., 230.
Cameron v. *Hodges*; 127 U. S., 322.
Crehore O. Ry. Co.; 113 U. S., 240.

The petition was by one defendant only.

2. NOR IS THE SUIT ONE ARISING UNDER THE LAWS OF THE UNITED STATES, NOR DOES THAT FACT SUFFICIENTLY APPEAR TO AUTHORIZE A REMOVAL ON THAT GROUND ALONE.

At the time the petition for removal was filed, the declaration in the suit contained one count, and is in the following language:

"IN THE CIRCUIT COURT OF COOK COUNTY.

"STATE OF ILLINOIS, } *November, A. D. 1882, Term.*
"COOK COUNTY. }

"Charles H. Mitchell, plaintiff, complains of Jabez G. "Smale, John I. Bennett and Frank I. Bennett of a plea of "ejectment for that whereas the plaintiff on the first day "of October, A. D. 1882, was possessed of a certain parcel "of land with the appurtenances lying and being in the "county aforesaid, to wit: the fractional southwest quarter "of fractional section twenty (20) in township thirty-seven "(37), north, range fifteen (15), east of the 3d principal "meridian according to a plat of the survey thereof "made by direction of the United States government and "returned into the general land office prior to the year "1850, which said land, appurtenances and tenements the "plaintiff claims in fee simple, and the plaintiff being so "thereof possessed, the defendants afterwards, to wit: on "the first day of November, A. D. 1882, entered into the "said land, appurtenances and tenements, and now unlawfully withhold from the plaintiff the possession thereof "to the damage of the plaintiff of one thousand dollars, "and therefore he brings his suit."

There were no pleas or other papers of any kind or character, whatever, in the case indicating in the slightest manner that the suit was one arising under the laws of the United States, or that the plaintiff would or could claim it to be such, or would contend for the existence of any fact or circumstance from which such claim might be inferred, and the only charge that it is a suit of that character, to be found anywhere in the record, is in the bare statement that the suit is one arising under the laws of the United States, as set forth in the second clause of the amended petition, and in the allegations therein imputing to the plaintiff the claims as therein stated. These imputed claims seem to furnish the chief foundation for the petitioner's allegations that the suit arises under the laws of the United States.

It is difficult to preceive the force or reason of this character of pleading. Such claims as are here attributed to the plaintiff, would have been quite futile and useless in this action of ejectment, no such claim could by any possibility have been made availing by the plaintiff in the trial of the cause.

Under the laws and rules of practice in the state of Illinois, in actions of ejectment, the title of the defendant is not to be assailed, but the title of the plaintiff must be maintained.

The old rule that the plaintiff must recover (if he recovers at all), upon the strength of his own title, is still the doctrine of the courts of this state.

Vallette v. *Bennett*, 69 Ill., 632.
Aholtz v. *Zellar*, 88 Ill., 24.
Cobb v. *Lavalle*, 89 Ill., 331.
Stumpf v. *Osterhage*, 94 Ill., 115.

The fact however, that he attributes such claims to the plaintiff, can avail petitioner nothing, in his effort to make it appear that the case is one for federal jurisdiction.

The question whether a party claims a right under the constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party.

New Jersey R. R. Co. v. *Mills*, 113 U. S., 249, 257.

But in fact no such claims were at any time made by the plaintiff, and as a matter of fact, at no time during the progress of the trial, or any of the subsequent proceedings—having reference to the merits of the case—has there been any act of congress, or any law of the United States drawn in question construed, relied upon or impugned by either party.

Counsel does not deny that in a proper case, *e.g.*, a suit in equity to set aside the patents and deeds under the 2nd survey, upon the ground that the officers of the General Government were without power to order the survey, and issue the patents thereunder (as they most certainly were) a federal question might arise within the meaning of Section 709 of the Revised Statutes; but counsel does not understand how a federal question,—as it is sometimes called—within the meaning of the removal Acts of March 3, 1875 can exist in the present case.

Provident Savings, etc. Society v. *Ford*, 114 U. S. 635.

The petition is not sufficient in form: It fails to point out, or specify the clause or section of the act, or even the act itself, under which the suit is supposed to arise.

The special facts necessary to give the court jurisdiction must appear upon the record by a statement in legal and logical form, such as is required in good pleading.

Gold-washing and Water Co. v. *Keyes*, 96 U. S. 199.

Carson v. *Dunham*, 121 U. S. 421.

The petition for removal is by one defendant only.

The language of the statute is * * * either party may remove said suit into the Circuit court of the United States. * * * By the word *party* is meant, the aggregation (if there be more than one person) of persons plaintiffs or defendants in the suit.

Removal cases, 100 U. S. 457.

Barney v. *Latham*, 103 U. S. 205.

II.

AS TO THE QUANTITY OF LAND WHICH PASSED TO DE WITT UNDER HIS PATENT, AND HENCE ACQUIRED BY PLAINTIFF IN ERROR.

This question is aswered by a determination of the effect of the surveyor's line run at the original survey, denominated a meander line, as a line of boundary.

Or, by determining whether the land was sold by the acre or as a specific tract.

It is found by the court in its special findings, that on the 1st day of March, 1850, the remote grantor of the plaintiff, Horatio B. DeWitt, received a patent for said land in the usual form, in and by which patent the land is described as the "south-west fractional quarter, of "fractional section 20, in township 37, of range 15 in the "district of lands subject to sale at Chicago, Illinois, con-

"taining four acres and fifty-three hundredths of an acre, "according to the official plat of the survey of the said "lands returned to the general land office by the Surveyor "General." (Clause 2, Printed record, p. 32). The court further finds that at the commencement of the suit the plaintiff through *mesne* conveyances, had acquired and held the title in fee simple to the lands so conveyed by the United States to said Horatio B. DeWitt under and by virtue of said patent (clause 3, *id*). The plat referred to represents a single tract of land *in solido*, lying within the above description, without any line or lines of division or separation appearing thereon, and represents the south-west boundary of said tract to be the waters of the lake.

What is a meander line?

There are eleven ordinances and acts of Congress together, of a general character, relating to the survey of the public lands prior to the year 1835, the date of the survey of the lands in question. In none of which is the subject of meandering or meander lines at all referred to.

The act of Congress under which the survey of the land in question evidently took place, is the act of February 11, 1805. Land Laws, part 1, Chap. 72, p. 119, Ed 1838, the provisions of which, so far as it relates to the subject in controversy are as follows:

"* * * § 2. And be it further enacted, that the boundaries and contents of the several sections, half sections and quarter sections of the public lands of the United States, shall be ascertained in conformity with the following principles, any act or acts to the contrary notwithstanding:

" 1st. All the corners marked in the surveys, returned by the Surveyor General, or by the surveyor of the land south of the State of Tennessee, respectively, shall be established as the proper corners of sections, or subdivisions of sections which they were intended to designate; and the corners of half and quarter sections, not marked on the said surveys, shall be placed as nearly as possible, equidistant from those two corners which stand on the same line.

" 2d. The boundary lines actually run and marked in the surveys returned by the Surveyor General, or by the surveyor of the land south of the State of Tennessee, respectively, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended; and the length of such lines, as returned by either of the surveyors aforesaid, shall be held and considered as the true length thereof. And the boundary lines which shall not have been actually run and marked as aforesaid shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships, where no such opposite corresponding corners have been or can be fixed, *the said boundary lines shall be ascertained* by running from the established corners due north and south or east and west lines, as the case may be, to the water-course, Indian boundary line, or other *external boundary* of such fractional township."

Hence there is not left the slightest ground for doubt, or conjecture, as to what was intended to constitute the boundary of tracts in such cases, the act most explicitly providing that the watercourse, Indian boundary line, or other external boundary, shall itself form the boundary in such cases.

It will be observed, however, that the second section above quoted, requires the *contents* of the several subdivisions to be also ascertained. This, obviously, cannot be done in the subdivisions rendered fractional by such obstruction without some process of measurement, and perhaps the only method which could have been adopted, or certainly the most convenient which could have been adopted in cases of water-courses, was that of meandering the water-course.

During the period covered by the ordinances and acts of Congress before mentioned, there were numerous circulars and letters from various officers of the government, giving explanations, constructions and directions touching the various laws referred to.

On the 31st day of March, 1820, Mr. Meigs wrote to the Surveyor General at Chillicothe, the following letter: (Land laws, Vol. 2, p. 819, No. 794; Ed. 1838.)

"SIR: It has been represented to me that township 9, "north of the base line, in range 4, west of the 2d princi- "pal meridian, has been surveyed into sections and di- "vided into quarters without regard to White river, a "navigable stream which runs through it. You will "therefore cause the said river to be meandered, and send "a plat to this office and to the register at Vincennes, "with the quantity of land contained in each quarter "section (in that township) through which the river "runs, that the register may know what allowances to "make to purchasers of those lands, and the river be re- "served as a highway. You will please have this done "immediately."

This letter contains the first allusion (which counsel has been able to find) touching the subject of meander-

ing water-courses, in connection with the government surveys.

From this it clearly appears that the prime object of such meandering, was the ascertainment of the quantity of land in the given fraction.

It is possible there may have been another object in this meandering the water-courses as indicated by the letter, namely, to at once determine and fix the character of the given water-course as navigable, or public waters, and indicate that none but navigable or public water-courses were to be meandered. Thus it has been frequently stated by courts, but never decided, so far as counsel is aware, that none but navigable waters were ever meandered by the government surveyors.

But, however this may be and which is of not so much importance in the present attitude of the case, it clearly appears, that neither by the law itself, nor the acts and conduct of the officers whose duty it was to execute the law, was it the object or intention in meandering a water-course, to make the surveyor's line or the so-called meander line, the boundary of the adjoining land.

The discussion of this subject first came before the courts of Illinois as early as the year 1841, in the case of *Middleton* v. *Pritchard*, 3 Scam., 510.

That was an action of trespass *quare clausum* for cutting timber on the land claimed.

One of the questions in the case was whether or not the *locus in quo* was bounded by the Mississippi river or by the *surveyor's line*, some distance from the river.

The trial court, of its own motion, gave to the jury the following charge or instruction:

"When lands are claimed by patent or grant from the Government of the United States and purchased at the several land offices from the plats there filed, and which are bounded by the Mississippi river, the purchaser cannot claim beyond the lines of the government survey, and must be controlled by lines and corners established and run by the government surveyor." (*Id.*, p. 511.)

The jury found for the defendant and the case was removed into the Supreme court.

In reviewing the case the Supreme court as to this said: "The island or peninsula is separated from the main land by a slough, formed by a gradual slope from each side, through which the water of the river runs two or three months in the year. The main land is overflowed in high water. In low water the slough is dry except some pools of standing water, and is filled with drifting wood. * * * The island and slough have not changed for the last thirty years. They are not marked or mapped upon the plat of the government surveys. But it appears the surveyor of the government traced the courses and distances along the margin of the slough next the main land, in order to estimate the quantity of land in the fraction, and which estimate did not include the *locus in quo*.

"But the plats in the land office and Surveyor General's office have no line marking these courses and distances as a boundary. They are taken from the field notes of meandering in the Surveyor General's office. * * * The maps, plats and field notes of the governmental surveys, by reference become a part of the evidences of title to enable the grantee to identify his boundary and lands.

So where islands are marked, mapped, platted or surveyed, or where lines are distinctly drawn on the plat, as bounding the front on rivers, lakes or other waters, these distinct acts of the grantor must explain, qualify, control or determine the interpretation, construction and extent of the grant. * * *

"It is denied that this land is bounded upon the river. We think there can be no question on that point, the fact appears so clear.

"There is no line upon the maps or plats, nor any direction in the field notes, nor any other visible monument to define and designate the southern boundary of the tract.

"It is true the field notes of the meandering of the front of this tract speak of it as the southerly boundary. But as I before remarked, the meandering is for the purpose of ascertaining the quantity of the land.

"Should it be incorrect still it would not entitle the party to a re-survey and new estimate. It is sold more or less. If there be more the purchaser gets it; if there be less, he loses it.

"This therefore cannot control. * * *

"We are therefore of the opinion the court misdirected the jury and that a new trial ought to be granted."

This case was early followed by that of the *Canal Trustees* v. *Haven*, 5 Gil., 548, 558, in which the subject of the effect of the so-called meander line was again very fully considered, by the same court, and the doctrine announced in the case of *Middleton* v. *Pritchard*, *supra*, approved.

In the consideration of the branch of the case referred

to, the court say: "The agreed case states as follows: It is admitted the Des Plaines River is meandered through the entire length of said sections, as appears by the minutes of said survey in said surveyor's office, a copy of which minutes is also attached, marked 2, and delineated on said maps. We do not understand this language to imply that the meandered line was marked upon the maps in the land and surveyor's offices but that it would appear by the *minutes* not *maps*, that said river was meandered, a copy of which minutes is also attached and delineated on said maps, not as they appear in said offices, but as they are made exhibits, which, however, is an error in point of fact, as there are no distinctions of said meandered lines upon the maps. As there was, therefore, no marked line upon the plat by which the grant was made, defining and limiting the land granted to the margin of the stream, the whole argument founded upon such a supposed state of facts fails.

"That a meandered line, which is run for the purpose of ascertaining the quantity of land in the fraction, is not a line of boundary has been settled by a former decision of this court, in the case of *Middleton* v. *Pritchard*, 3 Scam., 510."

More recently, the same subject again came before the Supreme court, in the case of *Houck* v. *Yates*, 82 Ill., 179. That was an ejectment for a valuable tract of land, lying along the Mississippi river, just above the city of Cairo.

After a trial in the Circuit court of the county in which the land is situate, it was taken to the Supreme court upon an agreed state of facts. In the opinion in the case, the court holds this language: "But it is insisted by ap-
"pellant that the field notes in the land office show that a
"line was run between the river marked on the plat and
"the lands actually purchased by appellee, and this line

" forms the southern boundary of his lands, and not the " river.

" Had any corner or monument been established to mark " the southern boundary of appellee's purchase, by the " government surveyors, such would have been conclusive. " That, however, did not occur, but the river seems to have " been left to mark the southern boundaries of the land. " The plats in the United States Land Office show the " river as a boundary.

" But it is said the meandered line ran by the govern- " ment surveyors along the fractional sections on the " south, mentioned in the stipulation, should control as to " the southern boundary of appellee's lands. Had corners " been established, or government monuments erected, or " plats made, showing it to be the intention that the " meandered line should form the southern boundary of " appellee's purchase, those facts would properly deter- " mine the extent of the grant; but that a meandered line, " which does not appear upon the plats in the United " States Land Office, and which was, no doubt, run for the " sole purpose of ascertaining the quantity of land in the " fraction, should have the same effect as a visible govern- " ment monument, is a proposition which we do not feel " inclined to sanction.

" Indeed it was settled in *Middleton* v. *Pritchard*, 3 " Scam., 510; and *Canal Trustees* v. *Haven*, 5 Gil., 548, " and subsequent cases, that a meandered line, which is run " for the purpose of ascertaining the quantity of land in the " fraction, cannot be regarded as a boundary line.

" If, in the original survey, the meandered line had been " designed as the Southern boundary of appellee's lands, " the government plats, no doubt, would have indicated " that fact, and the strip of land between the meandered

"line and the river would also have been surveyed and "platted. This, however, was not done.

"But the plat showing the river as the boundary of "appellees purchase, and the additional fact that the strip "of land between the meandered line and the river was "not surveyed or platted, would seem to leave no room "for doubt that the river was intended for the southern "boundary of appellees lands."

Judgment by the court accordingly.

The last case involving this question which came before the Supreme court is that of *Fuller* v. *Dauphin*, reported in the 124 Ill., 542. One of the principal questions in this case also was respecting the effect to be given to the surveyor's line run in meandering a watercourse. Chief Justice Sheldon in delivering the opinion of the court, after citing the cases of *Middleton* v. *Pritchard* and *Canal Trustees* v. *Haven supra* says: "*Houck* v. *Yates*, 82 Ill., "179, reaffirms the decision that a meandered line is not a "boundary line. The meandered line here does not in- "clude the *locus in quo*, but, according to the authorities "cited a meandered line is not a boundary line."

So that the decisions of the court of last resort, of Illinois, are entirely uniform and emphatic in deciding that surveyors lines or meander lines are not lines of boundary.

And equally so are the courts of last resort, upon this subject of all the states of the northwest, with possibly one exception. That of the State of Nebraska.

Jones v. *Pettibone*. 2 Wis., 308.
Boorman v. *Sunnuchs*, 42 Wis., 235.
Wright v. *Day*, 33 Wis., 260.
Shufeldt v. *Spaulding*, 37 Wis., 662.
Marquette Boom Co. v. *Adams*, 44 Mich., 403.

Rice v. *Ruddeman*, 10 Mich., 125.
Krant v. *Crawford*, 18 Iowa, 549.
Mussey v. *Hershey*, 42 Iowa, 364.
Ross v. *Faust*, 54 Ind., 471.
Sherlock v. *Bainbridge*, 41 Ind., 35.
Ridgeway v. *Ludlow*, 58 Ind. 249.
Schurmeir v. *St. Paul*, 10 Minn., 82.
Minto v. *Delaney*, 7 Oregon, 342.
Gavit v. *Chambers*, 3 Ohio, 495.
Morris v. *Benson*, 61 Mo., 345.

The decisions of the courts of the United States are to the same effect:

Forsythe v. *Small*, 7 Bissell, 201.
Schurmeir v. *Railroad*, 7 Wall, 272.

But, if this were otherwise, plaintiff in error insists in view of the uniform and repeated decisions of the highest court of the State upon this subject, extending through a period of fifty years, that so far as the State of Illinois is concerned, this question is settled, and the proposition that a meander line is not a line of boundary become an established rule of real property, and hence such rule should be adopted by all courts called upon to adjudicate similar questions touching real property lying within the State of Illinois.

Waring v. *Jackson*, 1 Pet., 570.
Hinde v. *Vattiers, lessee*, 5 Pet., 398.
Suydam v, *Williamson*, 24 How., 427.
Conway et al. v. *Taylor's Executor*, 1 Blk. 603.

The circumstance, that the fraction contained a greater number of acres than was estimated and paid for, is by no means a controlling circumstance.

It is a matter of history that the government has never been controlled by considerations of profit, in its transactions in the public lands.

And it is equally a matter of history or public notoriety that the early surveys of the public lands in the northwest particularly, were of the mos t indifferent and uncertain character. Indeed the matter of quantity was always considered but of se condary importance. The officers of the government whose duty it was to have the surveys of the public lands exe cuted, seem never to have insisted upon certainty in this respect. A perfect illustration of what is here stated will appear by reference to one of numerous letters of instructions from the heads of the land department of the government, to the surveyors of the public lands. Under date of March 13, 1805, Mr. Gallatin wrote a letter of instructions to the surveyor of lands in Mississippi, as follows:

"SIR: I have the honor to enclose an act concerning "the mode of surveying the public lands of the United "States, which although principally intended to palliate the "errors made in the surveys north of the Ohio, contains "certain general principles in relation to the mode of es- "tablishing corners and running interior lines, which ap- "ply to all the public lands. * * *

"The legislature has fixed the price at four dollars per "mile, that will not be enhanced; and although very "great correctness cannot be attained for that price, in "that part of the country, it is our duty to carry the law "into effect; *and all that can be expected is, that the sur- "veys will be as correct as can be done at that rate.*

"You will also perceive, from the enclosed act, that the "principal object which Congress have in view, is, that "corners and boundaries of the sections and subdivisions of

" sections should be definitely fixed, *and that the ascer-*
" *tainment of the precise contents of each is not considered*
" *as equally important; indeed it is not so material, either*
" *for the United States or for the individuals, that pur-*
" *chasers should actually hold a few acres more or less than*
" *their surveys may call for, as it is that they should know*
" *with precision, and so to avoid any litigation, what are*
" *the certain boundaries of their tract.* It is true that you
" will not be able to complete your work in that scientific
" manner which was desirable, and that it will not be
" possessed of that merit, in a geographical point of view,
" which your abilities enabled you to give it.

" But those are only secondary, though very desirable
" objects; and it is of primary importance that the land
" should be surveyed and divided, as well as it can be
" done, so as at least to connect the whole work, to ascer-
" tain the claims affirmed by the commissioners, and enable
" Government to dispose of the vacant lands."

Land Laws, Vol. 2, p. 787, No. 750, Ed. 1838.

The land was not sold by the acre.

The words in the patent to DeWitt, "containing four
" acres and fifty-three hundredths of an acre according to
" the official plat of the survey of the said lands," * * *
are merely descriptive of the premises, and not words of limitation upon the quantity sold.

Vowles v. *Craig*, 8 Cranch, 372.
Jackson v. *Moore*, 6 Cowen, 705.
Jackson v. *Deffendorf*, 1 Caines, 493.
Cottingham v. *Parr*, 93 Ill., 233.
Hathaway v. *Power*, 6 Hill, 453.

In the case of *Vowles* v. *Craig*. The complainant be-

came entitled to a certain survey upon a military land warrant for two thousand acres of land, this land was sold as containing (as was supposed) two thousand acres, whereas, in fact it containing about two thousand seven hundred acres, and a proceeding in chancery was instituted to recover back either the surplus land or the value thereof.

In the consideration of the case, it is said by the court:

"Was the sale of this survey of a specific quantity, at "a certain price per acre? or was it a sale of a specific "tract? The bill alleges it was of the first description; "the answer denies it, and say it was of the latter. There "is no proof to support the allegation in the bill, unless "from the survey, a power of attorney, and the receipt "for the purchase money, it should be inferred that, as "they relate to 2,000 acres of land, only that quantity "was intended to be included in the sale. But this proof "is conceived to furnish a very opposite conclusion, the "description and designation of the tract of land sold "was not as a part of a tract, but an entire tract. * * "* When an assignment is made of a plat and certifi- "cate of survey, the purchaser takes it subject to the "risk of its containing a less quantity than "is expressed on its face, and should it contain "more he is entitled to it. In the case "of *Young* v. *Craig*, decided by the court of appeals of "Kentucky (a copy of which has been furnished and "relied on by each party), the court say, there was par- "ticularly in the sales made at an early period of this "country, great liberality of admeasurement frequently "allowed by the seller and expected by the purchaser."

In the case of *Jackson* v. *Moore*, the deed described two certain tracts of land in a certain county in the State of

New York, viz.: townships numbered three and four in certain ranges, each township being six miles square and each containing twenty-three thousand and forty acres and no more, it proved that the area of these townships instead of being each six miles square were six by eight miles, and consequently must have contained, the two townships together, an excess of about fifteen thousand acres, and the question before the court was, what quantity passed by the deed, the whole of each township or only part of them, viz.: six miles square.

The court in deciding the case, said: "It is perfectly "settled that when a piece of land is conveyed by metes "and bounds, or any other certain description, all included "within those bounds, or that description will pass, "whether it be more or less than the quantity stated in "the deed."

To the same effect are all the other cases cited, and this seems to be the established doctrine of all the courts of the United States.

The effect of the reference to the plat of the survey in DeWitt's patent, is to make the plat a part of the patent.

Wash. Real Property, Vol. 3, 367.
Land Laws, Vol. 2, 758.
Deidrich v. *N. W. Ry. Co.*, 42 Wis., 260.
Shufeldt v. *Spaulding*, 37 Wis., 662.
Middleton v. *Pritchard*, 3 Scam., 510, 521.
Railroad Co. v. *Bates*, 1 Blk. U. S., 204.
Houck v. *Yates*, 82 Ill., 179.

By the plat it appears that all the land in the fractional south-west quarter, etc., is in *one* body, without lines or marks of separation or division, and shows to a demonstration that it was not the intention of the government

to reserve any part thereof from the sale and conveyance to DeWitt.

III.

AS TO THE QUESTION OF ADJUDICATION OF THE RIGHTS OF DE WITT BY THE OFFICERS OF THE LAND DEPARTMENT.

Plaintiff in error concedes that his rights in this regard are to be measured by those of De Witt.

But he insists that the action of those officers in denying his right to the premises, did not amount to an adjudication in fact, and if it were an adjudication in fact, yet the officers were without jurisdiction, and hence their acts were void.

The decision of the Commissioner of the General Land Office so far as it applies to DeWitt is concerned is as follows:

"The riparian claims of * * * Horatio B. DeWitt "have been denied by the action of this office in ordering "and approving the survey of the lake bed, thus treating "the land as belonging to the United States." (Printed record, p. 61.)

And the decision of the Secretary of the Interior is simply an affirmance of the commissioner's decision: The operative or decisive words being * * * "Your "decision rejecting the riparian claims of DeWitt * * * "is therefore affirmed." (Printed Record, p. 49.)

These are not words of adjudication; it is merely a statement that by some *former* action, namely, the ordering and approval of the survey, DeWitt's claim *had been* denied. The sum and substance of it all is, that the

taking possession of the land by the officers of the government and surveying the same, was *in effect* a decision that the land belonged to the United States, and therefore and thereby did not belong to DeWitt. But DeWitt was not a party to the proceedings for the survey, nor had he any notice of the intention to make such survey, and hence could not be bound by any action of the officers in such proceedings.

Nor had the officers jurisdiction of the case.

If De Witt had been a claimant for the land in the same sense—on the same footing—with the horde of others who appeared as applicants for it, that is to say, if he had recognized the legality of the survey, and had himself been an applicant for the entry thereof under some one of the various modes of entering the public lands, and the decision of the officers of the land department had been against his right, and in favor of some other applicant, then unquestionably their decision—in the absence of some unusual occurrence, such as fraud or mistake—would have been not only valid, but final, as to such contesting parties.

But that is by no means this case. De Witt appeared before those officers not in *pari causa* with the other applicants, but claiming the absolute ownership of the land, claiming that the title thereto had already passed to him by virtue of his patent, claiming that the United States had no title thereto whatever, and denying the right of these officers to again sell and convey the same to other parties.

These are subjects clearly without the scope of the jurisdiction of the officers of the land department, and therefore any adjudication of these subjects, by those officers are entirely void.

The authorities in support of this proposition are numerous.

Among the earliest cases is that of *Wilcox* v. *Jackson*, 13 Pet., 498, and among the latest, that of *Doolan* v. *Carr*, 125 U. S., 618, 625, all recognizing the principle and declaring that the acts of the officers of the land department, in determining the rights of parties in matters not within the scope of their power, are not only not final as between the parties to be affected thereby, but are void.

WILLIAM PRESCOTT,
Atty. for Plff. in Error.

Office Supreme Court U. S.
FILED,
JAN 16 1891
JAMES H. MCKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 167.

CHARLES H. MITCHELL,
Plaintiff in Error,

vs.

JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT and CONRAD N. JORDAN,
Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

W. C. GOUDY,
FOR DEFENDANTS IN ERROR.

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STATEMENT.

This action was brought by the plaintiff, claiming to be the owner by mesne conveyances from Horatio B. De Witt, who received a patent in March, 1850, for the fractional south-west quarter of fractional section 20, in township thirty-seven (37) north, range fifteen (15) east, of the third (3d) principal meridian, in Cook county, Illinois, —which fraction, when surveyed in 1835, as recited in the patent to DeWitt,—contained 4.53 acres, to recover the complement of 160 acres inside of the quarter lines of said quarter extended, or as surveyed subsequently by the government in 1874. The first survey was made in 1834 and 1835.

The plaintiff's declaration contained at the time of trial three counts:

First. Describing the original tract as described in the patent to DeWitt.

Second. Describing the whole supplement of the 160 acres in said south-west quarter; and,

Third. Describing a tract supposed to be bounded by water on all sides, except the north. (Record, pages 2, 3, 23 and 28.)

The case was tried before Judge GRESHAM, the parties having stipulated in writing waiving a jury, and after making special findings, the court rendered the judgment, from which this writ of error is brought to this court, adjudging the defendants not guilty as to all of the lands described in the declaration, except as to the said 4.53 acres, "and that the boundary of said described lands "does not extend beyond the meander line of the origi- "nal survey thereof by the United States." (Rec., p. 24 and 35.)

Before rendering said judgment the court made and filed in the case special findings, and among other things, found the purchase of said 4.53 acre tract by DeWit, and patent to him March 1, 1850, and that the plaintiff, at the time of the commencement of the suit had acquired title thereto by mesne conveyances; that at the time when the meander line was run, which the court held to be the boundary of said 4.53 acre tract on the south side, there were growing along and near the course of said meander line on both sides of it, large trees of different varieties; that as to the elevation of the ridge where said meandered line was run forming the southern boundary of said tract, the land averaged about four feet above the water at the

time the meander line was run; *that the level of the water in Hyde and Wolf lakes, existing at the time of this government survey of 1834 and 1835, was 2.2 feet above datum* and .4 (4–10) foot above the level of Lake Michigan. (Rec., 34); *that the physical conditions of the land and water are substantially what they were at the time of the original survey;* that there were two bodies of water—the one at the west having for many years been known as Hyde lake in ordinary speech, and that at the east, currently known as Wolf lake.

That there was always a body of land running from said 4.53 acre tract on the north in a south-westerly direction to the south-westerly part of section twenty-nine (29); that a portion of this land was a ridge of varying width and elevation, and timbered for most of the distance with oak, hickory, elm, ash, poplar and hackberry trees, three feet in diameter and under; that this elevated timbered ridge extended substantially the whole distance, except for about eighty or ninety rods where the growth of vegetation was of the same general character as that along the margin of the lakes; that there was an outlet from the westerly portion of said lake, or lakes, into the Calumet river running in a westerly direction through the fractional north half of section thirty (30) to its connection with the Calumet river; that the commissioner of the general land office caused the lands, which were omitted in the survey of 1834 and 1835, to be surveyed in 1874; that such survey was made by the United States by its proper officers and the lands sought to be recovered patented to Alice A. Condit in the usual form, and that the defendant Jordan is the owner by mesne conveyances of the lands so patented to said Condit; that Horatio B. DeWitt, the owner of said 4.53 acre tract in the original sur-

vey, contested before the proper officers of the land department the right of the United States to sell and convey title to said lands under said second survey, which contest was decided against the said DeWitt by the Secretary of the Interior on appeal and in favor of the right of the United States to sell said lands under said survey; that said meandered line, as it was originally run across said ridge and was adopted by the court as a line of boundary, is entirely above water; that the plaintiff's lines of boundary are the east line of the fractional south-west quarter of said fractional section twenty (20), the east and west half section line and the meander line as run by the government in 1834 and 1835, and that the tract contains 4.53 acres. (Record, pages 32, 33 and 34.)

These special findings are not to be questioned in this court. A map, marked "Deft's. Ex. 4," was duly verified by witnesses and introduced in evidence.

The elevations above datum are shown upon this map in large figures and in red ink. The kinds, size and location of trees also appear on it, and the distances in rods from the waters of Hyde lake to the waters of Wolf lake at the time this survey was made. The elevations above or the depressions below datum of the bed of Hyde lake are shown on the east and west quarter lines—*minus* denoting below datum, its absence above. There is also shown a road running the entire distance over this body of land from north-easterly to south-westerly.

It is conceded, and found by the court, that this body of land was *dry* for 150 rods south from the south line of the 4.53 acre tract on 20. If the court will look at the map (Defts.' Ex. 4) at a point just south of an elevation of 9.3 feet, marked "Elm 24," and at the right and left in bed of lakes noted "sand" and "sand bottom" respectively, the court will see the line where it is claimed that the two lakes meet. It will be observed that on and near this line the elevations between waters, commencing at the east are 2.4; 6.7; 4.5; and 3.9 feet, while in the bed of Wolf lake two are given as 1.2 and 1.3, and in that of Hyde lake .6 and .4 feet. The belt of timber is continuous here, and continues on down south of the quarter east and west line on N. ½ 29—the diameter of elm trees at the south end of the ridge being 2 feet. It will, also, be observed that there is another ridge, and parts of the way two ridges running from the alleged low belt along the west shore of Wolf lake, all the way across this body of land to the high ground south of the channel between the two lakes, except in the immediate vicinity of that channel. (The record does not show whether that channel is artificial or natural.) The elevation at marginal channel is shown.

The elevations along the last named ridges, commencing at the north end of them, are 3.5; 2.8; 3.3; 3.4; 3.6; 2.9; 3.4; 3.8; 4.1; 4.0; 3.3; close to and at the channel to where timber again grows to the south end. The character and size of this timber is also shown. Following the Hyde lake shore from "Elms" two feet in diameter just north of half section line section 29, the elevations are 3.7; 3.1; 2.7; 3.2; 3.2; 2.8; 2.2, and following the elevations between the ridges, commencing at said "Elms," they are 3.7; 2.6; 3.6; 2.7; 2.6; 2.4; 2.2.

This is the lowest part of this body of land between these lakes, and these figures show that when the original survey was made this also was land uncovered by the water—the elevations being all but one or two, in this whole distance of eighty rods and more, *above the elevation of the water at that time, as found by the court.*

As before stated, at the time of the survey of 1834 and 1835, the waters in Hyde and Wolf lakes stood at 2.2 feet above datum. By running the eye over this body of land between Hyde and Wolf lakes, and bearing this elevation in mind, it appears that this entire belt of land, running from the 4.53 acre tract south-westerly to the south line of section 29, *was land and substantially above water when the survey of 1834 and 1835 was made,* and was land omitted to be surveyed in said survey.

An extra copy of said map, or Exhibit 4, not attached to the brief, is left on file for more convenient use by the members of the court.

An inspection of these maps will also show that the elevation of the ground at the meander line forming the southern boundary of the 4.53 acre tract, was in places 6.6 feet above datum, and nowhere lower than 3.3 feet; that

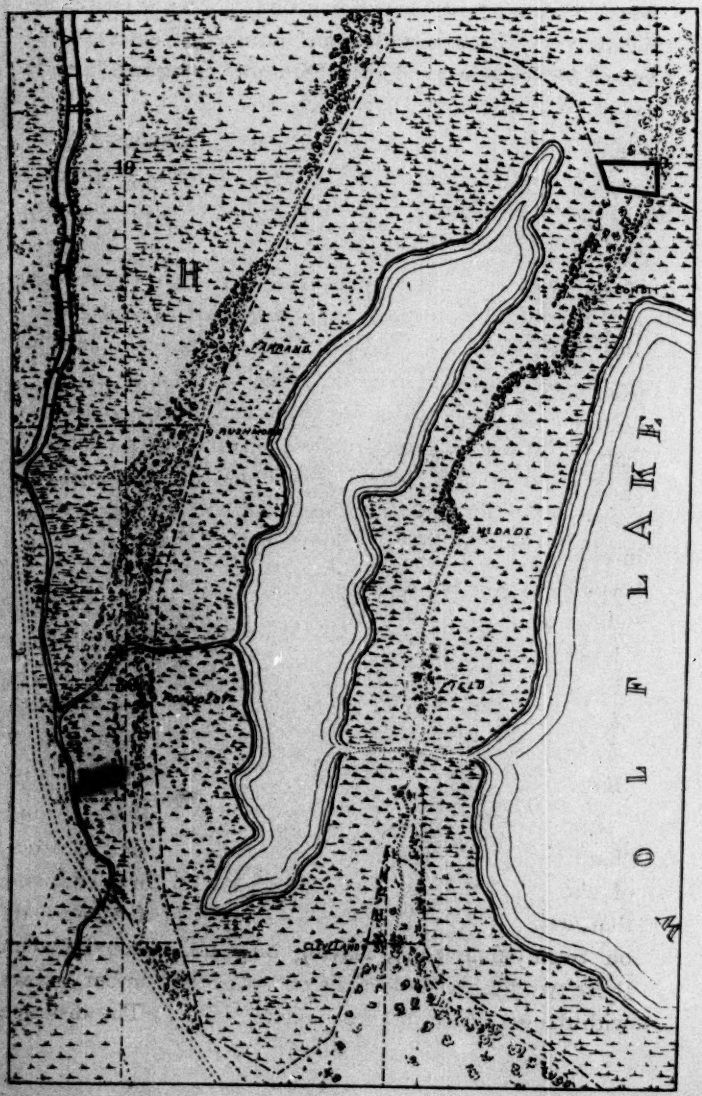
south of the meander line forming the southern boundary of this tract the elevations were greater, being 7.5; 8.2; 9.9; 8.3, etc., feet, showing that the timbered lands on the south of this tract were higher than the elevations immediately north of it, so far as given.

There was also verified by witnesses, introduced in evidence and marked "Deft's. Ex. 4½," another map or plat, showing, in addition to the topography, the meander line. (Record, between 40 and 41.)

Referring to the map or plat (Defts'. Ex. 4), the record says: "Said witnesses were permitted to and did "testify to the effect that said plat did represent with sub- "stantial correctness the relative position and condition of "the waters of the lake to the meander line in contro- "versy, and the topography and appearance of the sur- "rounding lands and water at said date," except one Gaughan, who thought that the north end of the map should be "a little more rounding." (Rec., 41.)

The following is the map:

Exhibit No. 4½.



The contour lines of this 4.53 acre tract are made heavier in the above maps for identification. Figures indicating elevations, distances and number of acre are enlarged for lease in reading. Distances are given in rods only.

The findings of the court verify these two maps.

Witnesses were introduced at the trial and testified with respect to these maps embracing the premises in controversy, and established the accuracy of said maps, so that they were introduced in evidence. (Rec., 40, 41.)

The accuracy of said maps and truthfulness of said testimony is not questioned, but the right to introduce the same is the only objection made thereto. That the physical structure of the tract, involved in this suit, is correctly shown by said maps is further manifested by the statement of the Commissioner of the General Land Office, in evidence in this case, that: "Notwithstanding the sur-"vey of 1835 treats the body of water as a whole, with no "division between what are now called Wolf and Hyde "lakes, there was in 1850 (the year when De Witt acquired "his patent), *a strip of timbered land running from the "border of the lake in section 20, south-westerly to its "border in section 29, thus dividing it into two parts.*" (Rec., 60.)

An inspection of these maps will show the size and character of timber over this belt of land for a distance of 220 rods from the meander line at the north end, and that timber is shown to grow up to the half section line on twenty-nine (29), leaving only the space between these two timbered portions on which no timber grows with the exception of an occasional willow. The distance

across this tract at various points is shown on the map. (Deft's. Ex. 4). It will, also, be observed that the bed of Hyde lake, so far as shown, was at or about datum, which is understood to be the height of Lake Michigan in 1849, and is adopted as the standard of water height. The bed of Hyde lake, so far as shown, is nowhere lower than one foot below datum.

An inspection of the map, will also show the elevations on the west of Hyde lake and the distances from the meander line as run by the government in 1834 to the water at the time the survey was made upon which this map was drafted.

It thus clearly appears that at the time when the government made its survey, in 1834 and 1835, the surveyor or agent John A. Clark, acting for the government, run this portion of the meander line as well as the corresponding portion of it on the section line between sections 29 and 32 through timber and across land elevated more than six feet above datum, treating as navigable water not only the shallow sheet now known as Hyde lake, whose bed is substantially above datum, but also, this mostly timbered and large belt of land running continuously from the meander line at the north to the meander line at the south. It necessarily follows that in treating this omitted tract, including this belt or body of land, as navigable water, and making a plat to that effect was a mistake, either negligently or intentionally made on the part of the surveyor and agent of the government.

It is probably unnecessary to add anything to the findings of the court already stated with respect to the decisions of the officers of the government. This record, however, contains those decisions.

February 12, 1878, the commissioner of the General Land Office, in deciding the appeal taken by DeWitt and others, said, among other things: "The riparian claims "of Gertrude Hardin and Horatio B. DeWitt have been "denied by the action of this office in ordering and ap- "proving the survey of the lake bed, thus treating the "land as belonging to the United States." From this decision DeWitt and Hardin prayed an appeal to Hon. Carl Schurz, Secretary of the Interior, who, in deciding the appeal, said, among other things: "The tracts sur- "veyed in 1834 and 1835 were disposed of long prior to "the survey of 1874, and owners of tracts that abutted upon the meanders of the lake under the old survey now "claim the newly conveyed tracts as riparian owners.

"The parties thus claiming are Horatio B. DeWitt and "Gertrude Hardin, both of whom have appealed. You "rejected their claims upon the ground that they 'have "been denied by the action of your office in ordering and "approving the survey of the lake bed, thus treating the "land as belonging to the United States.' It seems to me "that no other decision can consistently be reached. To "recognize riparian rights to these tracts would be equiv- "alent to saying that the lands did not belong to the "United States, and that the survey is a nullity. It is now "too late for this department to question the legality of the "survey. It is an accomplished fact. It was ordered, be- "gun and fully executed under a former administration. "Parties claiming the land under the laws of the United "States have proceeded with regard to their claims, rely- "ing upon its regularity and legality and they should be "heard by this department and have their claims disposed "of as in other similar cases of claims to public land. Your "predecessor decided to order the survey upon considera-

"tion of the application therefor, and it was ordered in "pursuance of the regular practice of your office and of "circular instructions for all surveys of that class of land. "The ordering of the survey, as well as the approval "thereof, involved a decision that the land belonged to "the United States.

"There is nothing to show that the order of approval "was procured by fraud, or that either was the result of in- "advertence or mistake. As no grounds are presented for "setting aside the action of your predecessor, or to show "that the lands were not subject to public survey in ac- "cordance with the rulings and practice of your office for "a long series of years, the survey will not be disturbed, "but will remain intact. Your decision rejecting the "riparian claims of DeWitt and Hardin is therefore "affirmed." (Rec., 48 and 49.)

Three several applications for a rehearing were successively made by Hardin, co-appellant of DeWitt, and denied. The first was decided by the Acting Secretary of the Interior, August 24, 1880, wherein it is, among other things, said, the petition for rehearing was simply a reargument of the original case, and that it presented "no new or additional reasons why the action of your "predecessor in ordering and approving the survey of "1874, should be now disturbed." It is further stated that "the decision (of Secretary Schurz), held in effect that "the matter of ordering and approving of said survey "was *res judicata*, and that no case had been made out "under the well established rule to justify the present "head of the department in reopening or setting aside "the action of your predecessor in the premises." * * * "I find from the records of your office that Mrs. Hardin "had knowledge of the fact that the survey was being

"made, and due notice of the approval thereof, and of "the filing of the plat in the local office at Springfield, and "took no appeal.

"Considerable correspondence was had between Mr. "I. N. Hardin, who appears as attorney in fact for "Gertude H. Hardin, and your office pending the sur- "vey." * * * "On the 28th day of November, "1874, he was advised that the survey had been approved. "On the 30th of September, 1874, he addressed a letter "to your office, which the following reply thereto, under "date of Jany., 1875, addressed to Mr. Hardin, at 238 "South Water street, explain: 'I am in receipt of your "letter of the 30th ult., requesting to be informed what "effect the approval of the survey of Wolf lake has upon "the subject of your former communications, namely, viz: "the question raised by you as to the navigability of the "waters of said lake. You, also, enquire whether this "office regards the lands from which the waters have "receded as public lands.

"In reply I have to inform you that conclusive evi- "dence having been filed in this office, showing the non- "navigability of the waters of the bed of said lake, and "the survey having been made and approved, the plat "thereof, together with instructions to the register and "receiver, has this day been forwarded to the local land "office at Springfield, Illinois. The lands are regarded "as public lands.'" (Rec., 52 and 53.)

The second application for a rehearing was decided by Secretary Kirkwood, April 28, 1881, denying the rehearing. (Rec., 57.)

The third application for a rehearing was decided by the Secretary of the Interior in an elaborate opinion, May 16, 1881. (Rec., 54, 55 and 56.) From the decision of

Secretary Schurz affirming that of the commissioner of the General Land Office, no appeal was ever taken, nor was there any appeal ever taken from the action of the department in approving the plat. (Rec., 53.)

These special findings of the court, so far as they are upon questions of facts, are not the subject of controversy in this court, but must be taken as true.

This statement is necessary because of the course pursued by counsel for the plaintiff in his argument.

The jury was waived in the trial court and the case heard by the judge, whose findings of fact are conclusive in this court, and on which questions of law arising can only be considered here. Yet counsel for plaintiff has proceeded to argue as if the plat based on the survey of 1834 was correct, as if there was a large body of water which is marked "navigable lake," in existence in 1834, and when DeWitt entered the land, when in fact, as found by the court, there was not, but on the contrary a large body of dry land, which has continued to this day.

There is not so much difference with counsel as to his law, as to his facts. His citations of authorities may apply to his supposed case, but certainly do not to the case, in this record. Particular attention is called to the several maps in the argument, which are purely fictitious and not in the record, and are contrary to the findings of the trial court.

The attention of the court is respectfully called to some of these inaccuracies.

At page 4 of plaintiff's brief, this continuous body of land lying between Wolf and Hyde lakes, at the time of the survey of 1834 and 1835, is called a "narrow *strip* " or *tongue* of land," projecting in a south-westerly direc-

tion *through the lake*, and containing, at the time of the trial below, "*about twenty-five acres of dry land.*"

Where, in the record, is the evidence to warrant the use of the expression "tongue of land," as if it extended into the lake, terminating *in the water*, or the statement "containing" * * * "about twenty-five acres of "DRY land"?

The question is not whether this continuous body of land between these lakes was *dry* land; but was it land.

Again, the attention of the court is called to a map between pages 4 and 5 of plaintiff's brief.

Where, in this record, are the material out of which this map can be constructed?

The part of it in Illinois could be taken from Plaintiff's Exhibit B. (Rec., bet. pages 30 and 31.)

But as a whole the map is ideal. There is no evidence in the record to support any portion of it lying in the State of Indiana, except the finding of the court with respect to Wolf river, and as to that the court finds: "It "was and has continued to be subject to interruption by "the formation of a sand-bar across the mouth thereof, "upon the shore of Lake Michigan." (Rec., 33.)

On this imaginary map is shown the "tongue of land," and an island—the rest is represented as permanent water.

Compare this with Defendants' Exhibits 4 and 4½ and the findings of the court, and it will be seen how misleading and untrue this ideal map is.

It will be observed on page 10 of plaintiff's brief, it is stated that when these land claims were inaugurated, "the "officers of the local land office at Springfield, Illinois"

(the register and receiver), were "instructed" * * * "to transmit all the proceedings, *with their joint opinion* "*thereon to the general land office.*"

The writer of the brief states that this DeWitt claim, "*without their opinion* was *referred* by the local officers "to the commissioner of the general land office," etc. (Plff's brief, 10.)

The commissioner of the general land office says: "On "transmitting the claims and testimony, the district offi- "cers at Springfield forwarded *their joint opinion thereon*, "adverse to the claims of" * * * "the riparian "claimants"—among whom was DeWitt. (Rec., 59.)

Why this conflict of statement by one who like the Trojan hero at the court of Dido, might well say:

"*quaeque ipse miserrima vidi,*
Et quorum pars magna fui."

Points and Authorities.

I.

The mere fact that a meander line is designated upon the government plat, as a meander line cannot be conclusive in the matter.

The patents issued under the survey of 1874, under which Jordan held, were lands omitted in the survey of 1835, the title to which remained in the government of the United States.

A. The reasons assigned by the Commissioner of the General Land office in ordering the survey of 1874, are immaterial.

The title to the lands described in the declaration is in issue, and not the right or propriety of making the survey.

B. The government is not estopped or bound by the statements, acts or representations of its agents, where they are not in accordance with the truth, and the truth may always be shown.

Lammers v. *Nissen*, 4 Neb., 245.
Alexander v. *Georgia*, 56 Ga., 486.
People v. *Brown et al.*, 67 Ill., 438.
Taylor v. *Shafford*, 4 Haker, 132.
Chandler v. *Landford*, 4 Dev. & Batl., 408.
Wallace v. *Maxwell*, 10 Riddell, 212.
Farish v. *Corn*, 40 Cal., 50.
Crane v. *Reeder*, 25 Mich., 320.

United States v. *Insley et al.*, 9 Sup. Ct. Reporter, 485 and 486, and cases there cited; also reported in 130 U. S., 266.

The exception to the rule, viz.: where the act is done in the sovereign capacity of the state, as by a legislative enactment or resolution, does not cover this case.

Alexander v. *Georgia*, 56 Ga., 486.
State of Indiana v. *Milk*, 11 Fed. R., 389.

C. Where meander lines are run by government surveyors surveying government land so as to leave between such lines and the banks or bodies of water which are purported to be meandered considerable bodies of land, which are above the ordinary stage of such water, and covered with vegetation or timber, the patents for the surveyed land are limited by the meander line, and the patentees are not riparian proprietors.

Granger v. *Swart*, 1st Wolworth, 90.
Lammers v. *Nissen*, 4 Neb., 245.
Glenn v. *Jeffrey*, 75 Iowa, 20.
Bissell v. *Fletcher*, 19 Neb., 726.
Bissell v. *Fletcher*, 43 N. W. R., 350.

The official act of the officers of the Land Department will be presumed to have been lawfully performed.

Bank v. *Dandridge*, 12 Wheat., 70.
Coombs v. *Lane*, 4 Ohio St., 112.
Ward v. *Barrows*, 2 Ohio St., 241.
Tecumseh Town Site case, 3 Neb., 284.

D. The general principles of the law of riparian rights, where they exist, are not controverted in this case.

The contention here is that they do not exist.

3 Kent Com., 427.

Deidrich v. *The N. W. R. R. Co.*, 42 Wis., 262.
R. R. v. *Schurmier*, 7 Wall., 272.
Braxton et al. v. *Bressner*, 64 Ill., 488.

E. It is the law in Illinois, as established by the Supreme court of that state, that *where land is conveyed or granted along or upon a natural non-navigable lake or pond, the conveyance or grant extends only to the water's edge.*

Trustees of Schools v. *Schroll et al.*, 120 Ill., 519.

This court will adopt the rule determined by the Supreme court of Illinois, in respect to riparian rights of individual contestants upon non-navigable waters within that state.

Barney v. *Keokuk*, 94 U. S., 228.

Those bodies of water are non-navigable which are not navigable *in fact.*

Gould on Waters, Sec. 43 and note, and authorities cited; and Sec. 54 and note, and Sec. 72.
McManus v. *Carmichael*, 3 Iowa, 1.
Colchester v. *Brooke*, 7 Q. B., 339.
Mayor v. *Lynn*, 1 Cooper, 86.
Miles v. *Rose*, 5 Taunt., 706.
Rex v. *Montagu*, 4 B. C., 598.
The Monticello, 20 Wall., 439.
The Daniel Bell, 10 Wall., 557.

To be navigable the waters must form, by themselves or their connections with other waters, a continuous highway over which commerce is or may be carried on.

Rowe v. *Granite Bridge Co.*, 21 Pick., 344.

Charleston v. *County Commissioner*, 3 Met., 202.
Attorney General v. *Woode*, 188 Mass., 436.
United States v. *New Bedford Bridge*, 1 Wood & M., 401.
Weathersfield v. *Humphy*, 20 Conn., 218.
Grotin v. *Hurlburt*, 22 Conn., 178.
Burrows v. *Gallup*, 32 Conn., 501.
Brown v. *Preston*, 38 Conn., 219.
Glover v. *Powell*, 10 N. J. Eq., 211.
Flannagan v. *Phil.*, 42 Penn., St., 219.

F. Hyde lake being non-navigable, its bed did not pass to the State of Illinois as the trustee for the public and conservator of the right of public navigation, and the survey and patent of the lands involved in this case is in accord with its uniform practice.

Rogers v. *Jones*, 1 Wend., 255.
Canal Comr. v. *The People*, 5 Wend., 448.
Smith v. *Miller*, 5 Mason (U. S. C. C.), 191.
Coovert v. *O'Connor*, 8 Watts, 470.
Angell on Water Courses, Sec. 6.
Ledyard v. *TenEyck*, 36 Barb., 102.

An easement in non-navigable waters cannot exist, except by grant or prescription.

Cook v. *Stevens*, 11 Mass., 533.
Stevens v. *Stevens*, 11 Met., 255.
Gould on Waters, Sec. 300, note 3.

G. The principle established by the Supreme court of Illinois in the case of *Trustees of Schools* v. *Schroll et al.*, 120 Ill., 519, that the owners of lands bordering on ponds

and non-navigable lakes are limited to the water's edge, is fully sustained by the most trustworthy and reliable line of authorities.

Wheeler v. *Spinola*, 54 N. Y., 385.
Canal Comr. v. *The People*, 5 Wend., 446.
Champlain & St. L. R. R. Co. v. *Valentine*, 19 Barb., 490.
Kingman v. *Sparrow*, 12 Barb., 206.
Waterman v. *Johnson*, 13 Pick., 265.
Roxbury v. *Stoddard et al.*, 7 Allen, 167.
Paine v. *Woods*, 108 Mass., 170.
Hittinger v. *Eames*, 121 Mass., 546.
Prinner et al. v. *Walker*, 38 Mo., 99.
Bradley v. *Rice*, 13 Mo., 201.
Nelson v. *Butterfield*, 21 Mo., 229.
Wood v. *Kelley*, 30 Mo., 53.
Robinson v. *White*, 42 Mo., 218.
Manson v. *Blake*, 62 Mo., 41.
State v. *Gilmanton*, 9 N. H., 463.
Fletcher v. *Philips*, 28 Vt., 268.
Austin et al. v. *Rutland R. R. Co. et al.*, 45 Vt., 242.
Mariner v. *Schulte*, 13 Wis., 698.
Indiana v. *Milk*, 11 Fed. Rep., 395.

H. *Whether the mathematical lines run by the surveyor in 1835, and established by monuments at the intersection of section lines, or the water's edge was the real boundary of the lands involved in this suit, the title acquired by the patentees of the fractions was limited to the boundary line, and no riparian rights are involved.*

The title to the soil under the water is entirely independent of that to the bank.

Diedrich v. *The N. W. Ry. Co.*, 42 Minn., 262.

II.

HARDIN AND DEWITT HAVING BEEN NOTIFIED, AND HAVING APPEARED BEFORE THE REGISTER AND RECEIVER OF THE LOCAL LAND OFFICE; HAVING APPEALED FROM THEIR DECISION TO THE COMMISSIONER OF THE GENERAL LAND OFFICE, AND AGAIN APPEALED FROM HIS DECISION TO THE SECRETARY OF THE INTERIOR AND HAVING CONTESTED IN THE LAND DEPARTMENT BEFORE THESE OFFICERS OF THE GOVERNMENT, THE QUESTION WHETHER OR NOT THE LAND EMBRACED IN THE SURVEY OF 1874 BELONGED TO THE GOVERNMENT; THE DECISION OF THE SECRETARY OF THE INTERIOR HAVING BEEN ADVERSE TO THEM; AND THE QUESTION HAVING BEEN DECIDED UPON EVIDENCE ADDUCED BEARING UPON THE QUESTION AS A FACT, THEY AND THEIR GRANTORS ARE ESTOPPED BY THE DECISION OF THE SECRETARY OF THE INTERIOR FROM AGAIN CONTESTING THE QUESTION IN THE COURTS.

Johnson v. *Tousley*, 19 Wall., 83.
Warren v. *Van Brunt*, 19 Wall., 653.
Shepley et al. v. *Cowan et al.*, 91 U. S., 340.
Moore v. *Robins*, 96 U. S., 530.
Marquiz v. *Frisbie*, 101 U. S., 473.
Vance v. *Van Brunt*, 101 U. S., 519.
United States v. *Schinz*, 102 U. S., 401.
Smelting Co. v. *Kemp*, 104 U. S., 646.
Steele v. *Smelting Co.*, 106 U. S., 447.
Quinn v. *Conlon*, 104 U. S., 421.
Baldwin v. *Stark*, 107 U. S., 465.
Cowell v. *Lammers*, 21 Fed. R., 200.
Wright v. *Dubois*, 21 Fed. R., 649.

Aurora Hill Con. Min. Co. v. *85 Min. Co. et al*, 34 Fed. Rep., 515.
Terry v. *Steele*, 18 Legal News, 2.
Cragin v. *Powell*, 128 U. S., 693.

Also

Haydil v. *Dufresne*, 17 How., 25.
Steele v. *St. L. Smelting & Min. Co.*, 106 U. S., 447.
Pollard v. *Dwight*, 4 Cranch, 429.
West v. *Cochran*, 17 How., 403.
Stanford v. *Taylor*, 18 How., 409.
Gazzam v. *Phillips*, 20 How., 372.
U. S. v. *San Jacinto Tin Co.*, 125 U. S., 273.
Fisher v. *O'Connor*, 115 U. S., 122.

III.

Assignment of Errors.

(The discussion of points under this head will be found near foot of B. commencing at "III").

Certain acts done by plaintiff after removal to be considered.

No plea to the jurisdiction was ever filed.

A motion to remand, like a demurrer, can only be heard upon the face of the whole record. Jurisdictional *facts dehors* the record, must be raised by plea.

Clarkhuff v. *Wisconsin, I. & N. R. Co.*, 26 Fed. R., 465.
LaCroix v. *Lyons*, 27 Fed. R., 403.
Smith v. *Kernochen*, 7 How., 198.
De Wolf v. *Ruband*, 1 Pet., 476.
DeSobry v. *Nichalson*, 3 Wall., 421.
Wickliffe v. *Owings*, 17 How., 51 and 52.
Shippard v. *Grover*, 14 How., 505 and 513.

The determination of the issue made upon such a plea is conclusive.

Sharon v. *Hill*, 26 Fed. R., 722.

If the motion made and denied in this case was treated as a plea by consent of parties, the denial of the motion was conclusive.

Under the state of facts disclosed by this record the court should retain jurisdiction.

The petition for removal is the basis of jurisdiction, and its statements are *prima facie* true.

Kissinger v. *Hinkhouse*, 27 Fed. R., 883.
Clarkhuff v. *Wisconsin, I. & N. R. Co. et al.*, 26 Fed., R., 465.

John I. and Frank I. Bennett were improper parties. They had conveyed to Jordan, October 4, 1882, and suit was commenced November 8, 1882.

The only contention as to citizenship is narrowed to Smale.

Before the removal Smale surrendered his lease to Jordan and entered into a new one, in which he expressly agrees to hold the premises subject to the *lis pendens* of this suit, and to obey any process which might be issued in the case, and disclaimed any interest.

This case is therefore unlike

Phelps v. *Oaks*, 117 U. S., 888,

cited by counsel.

Although suit was rightly brought against Smale, he had been divested of all interest before removal.

A judgment against Jordan would have evicted Smale from the possession.

Nelson v. *Hennessey et al.*, 33 Fed. R., 113.
Bacon v. *Felt*, 38 Fed. R., 368.

In Illinois a judgment against the tenant binds the landlord.

This does not seem to have been so in *Phelps* v. *Oaks*, 117 U. S., 237.

The second ground for removal is that a law of the United States was necessarily drawn in question was sufficient without regard to the citizenship of parties.

It was not necessary that the ground for removal should be set forth in the pleadings.

Kissinger v. *Hinkhouse*, 27 Fed. R., 883.

When reference is made to a body of congressional enactments, in pursuance of which the government through its land department disposes of its public lands, an enumeration of the special acts of Congress constituting the body of these lands is not necessary.

The Frank G. & S. M. Co. v. *Larimer*, 8 Fed. R., 724.

If a federal law is to any extent an ingredient of the controversy by way of claim or defense, the condition exists upon which the right of removal depends.

It existed in this case.

Western Union Telegraph Co. v. *National Telegraph Co.*, Vol. 19 Fed. R., 561.

Illinois v. *The Chicago, Burlington & Quincy R. R. Co.*, 16 Fed. R., 707.

Willard, Trustee, v. *Mueller*, 23 Fed. R., 209.

New Orleans, Mobile & Texas R. R. Co. v. *Mississippi*, 102 U. S., 135.

Sowles v. *Witters*, 43 Fed R., 700.

The assignment of error for the admission of oral evidence, maps, patents, etc., is without merit.

Granger v. *Swart*, 1 Wol., 90.

Lammers v. *Nissen*, 4 *ib.*, 245.

Bissell v. *Fletcher*, 19 *ib.*, 726.

The special findings were lawfully made, and must be accepted as true.

Booth v. *Tiernan*, 109 U. S., 205.

Prentice v. *Stearnes*, 113 U. S., 435.

ARGUMENT.

I.

May it please your Honors, I contend in the first place:

THAT THE LANDS INVOLVED IN THIS SUIT ON SECTIONS 19, 20, 29 AND 30, TO WHICH PATENTS WERE ISSUED UNDER THE SURVEY OF 1874, WERE LANDS OMITTED IN THE SURVEY OF 1835, THE TITLE TO WHICH REMAINED IN THE GOVERNMENT OF THE UNITED STATES UNTIL CERTIFICATES OF PURCHASE WERE ISSUED TO THE PATENTEES UNDER THE JUNIOR SURVEY, AND THAT THEY SEVERALLY BECAME VESTED BY THEIR SEVERAL CERTIFICATES OF PURCHASE AND SUBSEQUENT PATENTS WITH AN ABSOLUTE TITLE IN FEE SIMPLE TO THESE LANDS.

A. The proof, in this case, is conclusive that the surveyor representing the government in making the survey of 1835, either intentionally or negligently omitted these lands, and knowingly or carelessly represented them as navigable water on the plat of the survey, which he reported to the government, and under which survey these several fractional tracts on 20, 29, 19 and 30 were subsequently patented.

It is not to be questioned that, at the time of the survey in 1835, there was a continuous body of land running in a south-westerly and north-easterly direction from the meander line run in that survey as the south line of said fractional south-west quarter of section 20, and the meander line run in the same survey as the north-easterly boundary of said fractional section 29.

The findings in this record approach mathematical certainty, that when the surveyor made his survey, in 1835, he either impelled by his personal interest in his contract with the government, or by negligence and inattention, clearly mistook the line, which he should have properly meandered. He ignored the existence of this large body of land and treated it as navigable water, whereas, it must have been manifest that it was land, and must have been clear, also, that Hyde lake, now so called, was a mere pond and marsh of very shallow water.

It is probable that at the time of this survey, from rainfall or melting ice and snow, the water was in an abnormal state, but as we have seen, the court has fixed the state of the water at that time to have been 2.2 feet above datum, and hence, to have represented this land as navigable water was a false return on the part of the Deputy Surveyor Clark and a fraud upon the government. He clearly should have run his meander line along the west shore of what is now Wolf lake; and approximately upon the half section north and south line of sections 20 and 29, instead of on the west side of the marsh, which then as now existed west of what is now called Hyde lake. This whole region was, probably, regarded at that time as of little value.

In making this mistake, however, the act of the surveyor in running this meander line and making a false return of it was not binding upon the government. Its rights and the rights of others were not affected by the representation in his Field notes, and upon the plat of his survey made in the Department and based upon them, that the meander line was run along the shore of a "navigable lake," nor that this large tract of land was navigable water.

The fact that the commissioner of the general land office, in ordering a survey in 1874, proceded upon the theory that the title to the bed of a lake which had become dry, although erroneous, does not change the rights of the parties. If land which should have been surveyed in 1834, was omitted, it was lawful to make the survey in 1874, and the reasons assigned by the Commissioner are immaterial.

The title to the land described in the declaration is in issue, and not the right or propriety of making a survey in 1874.

B. IT IS A FUNDAMENTAL PRINCIPLE THAT THE GOVERNMENT IS NOT ESTOPPED OR BOUND BY THE STATEMENTS, ACTS OR REPRESENTATIONS OF ITS AGENTS WHEN THEY ARE NOT IN ACCORDANCE WITH THE TRUTH, AND THAT, NOTWITHSTANDING, THE TRUTH MAY ALWAYS BE SHOWN.

Lammers v. *Nissen*, 4 Neb., 245.
Taylor v. *Shufford*, 4 Hakes, 132.
Chandler v. *Lansford et al.*, 4 Dev. & Battle, 408.
Wallace v. *Maxwell*, 10 Riddell, 212.
Farish v. *Coon*, 40 Cal., 50.
Crane v. *Reeder*, 25 Mich., 320.
Alexander v. *Georgia*, 56 Ga., 486.
People v. *Brown et al.*, 67th Ill., 438.
United States v. *Insley et al.*, 9th Sup. Ct. Reporter, 485–6., and cases there cited; also, 130 U. S., 266.

The exception to the rule, which does not cover the prosent case, is where the act is done in the sovereign

capacity of the state, as by a legislative enactment or resolution.

Alexander v. *Georgia*, 56 Ga., 486.
State of Indiana v. *Milk*, 11 Fed. R., 389.

In *Lammers* v. *Nissen*, *ante*, the court say: "The mere "fact that it is run and is designated upon the plats as a "meander line, certainly cannot be conclusive in the mat- "ter. To establish the doctrine that such meander line is "conclusive would estop the government from disposing of "lands unsurveyed between such line and the bank of the "stream. It would prevent the correction of mistakes "made by surveyors in such case and would be in direct "conflict with the well settled rule of law defining what is "an accretion to land."

In the case of *Taylor* v. *Shufford*, 4 Hakes, 132, the court say: "I know of no case where the sovereign "power has been estopped; the cases are all the other "way, and policy and justice require that they shall be "so. This sovereign, or sovereign power, is a trustee "for the people; it acts by agents; the people should not "be bound by any statement of facts made by those "agents for their benefit, the truth may always be shown, "notwithstanding any former statement to the contrary."

In *Chandler* v. *Lansford*, Chief Justice Ruffin, refer- ing to the above case, says: "The sovereign cannot be "estopped, as a rule of justice and policy, equally appli- "cable to our institutions and to those of the mother "country. The state was, therefore, at liberty to aver, "that at the time the patent to the lessor of the plaintiff "emanated, the land had been granted to Blount; and, "so may, consequently, the defendant."

In *Wallace* v. *Maxwell*, 10 Riddell, 112, the court say:

"The sovereign cannot be estopped. It acts by agents "and is the trustee of the people, and for their benefit "the truth may always be shown."

In *Farish* v. *Coon*, 40 Cal., 50, the court say: "Nor "is the state estopped from asserting title to these lands "by the fact that the purchase money for the warrants "was paid into the state treasury and has never been re- "funded or offered to be refunded. When the pur- "chasers of the first purchased the warrants, they knew, "or were bound in law to know, they could only be lo- "cated on lands belonging to the United States. They "were sold to them by the state for that express pur- "pose and no other, and there was no covenant, express "or implied, that, if through mistake, the warrants should "be located on other lands, not subject to location, the "state should refund the money." * * * "Estoppels "are maintained on precisely the opposite theory. The "state is under no obligations, legal or moral, either to "return the purchase money for the warrants, or to re- "frain from claiming the land." * * * "Equitable "estoppels are founded solely on the theory that to per- "mit a party to maintain the right which he asserts "would operate as a legal fraud upon his adversary."

In *Crane* v. *Reeder*, Judge COOLEY, delivering the opinion of the court, says: "The doctrine that the state "would waive its rights to its lands or estop itself from "claiming them by taxing them to an occupier and tak- "ing proceeding to enforce payment of the taxes, would "be rather startling to the officers having charge of the "public domain and would indicate an easy mode in which "trespassers would convert their trespass into a complete "ownership."

In *Alexander* v. *The State of Georgia*, the court say: "As

"a question of law the state is not bound or estopped "from asserting her rights to her own property, unless "it is done in her sovereign capacity by a legislative en- "actment or resolution."

Justice BREESE, in delivering the opinion of the court, "in *The People* v. *Brown et al.*, 67th Ill., 438, *ante* said: "It is a familiar doctrine that the state is not embraced "within the Statute of Limitations unless specially "named; and, by analogy, would not fall within the doc- "trine of estoppel. Its rights, revenues and property "would be at a fearful hazard should this doctrine be "applicable to a state. A great and over-shadowing pub- "policy of preserving their rights, revenues and property "from injury and loss by the negligence of public officers "forbids the application of the doctrine. If it can be ap- "plied in this case, where a comparatively small amount "is involved, it must be applied where millions are in- "volved, thus threatening the very existence of the "government."

In the case of *The United States* v. *Insley et al.*, 9th Sup. Ct. Reporter, 485, the court repeating the language used in a former case say: "It is settled beyond doubt "or controversy—upon the foundation of a great princi- "ple of public policy, applicable to all governments alike, "which forbids that the public interest shall be prejudiced "by the negligence of the officers, or agents, into whose "care they are confided—that the United States has certain "rights invested in them as a sovereign government, are "not bound by any statute of limitations, unless Congress "has clearly manifested its intention that they should be "so bound."

Citing

Lindsey v. *Miller*, 6th Pet., 666.

United States v. *Knight*, 14 Pet., 301.
United States v. *Thompson*, 98 U. S., 486.
Fink v. *O'Neil*, 106 U. S., 272.

And also, quoting the language of the case of the *United States* v. *Beebe*, say:

"The principle that the United States are not bound "by any statute of limitations, nor barred by any laches "of their officers, however gross, in a suit brought by "them as a sovereign government to enforce a public "right or to assert a public interest is established past all "controversy or doubt."

This doctrine has been illustrated and enforced by the courts in many leading cases, whose authority cannot be disputed, and which are conclusive, as it seems to me, in this case.

Mr. Gould, in his recent work on waters, which is accepted as a standard authority, says, commencing in the last line on page 276:

"IF A MEANDER LINE, RUN BY GOVERNMENT SURVEYORS "IN SURVEYING THE PUBLIC LANDS, LEAVES BETWEEN "SUCH LINE AND THE BANK OF THE STREAM A CON-"SIDERABLE BODY OF LAND WHICH IS ABOVE THE "ORDINARY STAGE OF THE WATER IN THE STREAM, "AND IS COVERED WITH VEGETATION OR TIMBER, THE "PATENT FOR THE SURVEYED LAND IS LIMITED BY THE "MEANDER LINE, AND THE PATENTEE IS NOT A RI-"PARIAN PROPRIETOR."

The author is abundantly supported by a number of cases, whose authority ought not to be controverted, and is not assailed by any known case.

The late Justice Miller, sitting in the Wisconsin circuit

in 1865, upon the trial before a jury of the case of *Granger* v. *Swart*, 1 Wol., 90, laid down a principle announced by Gould in the text above quoted. In instructing the jury he said: "Walker had entered certain lands, "which at one time bounded on Lake Koshkonong and "Rock river. The government surveyor had run a "meander line afterwards, but before the entry, as the "evidence tended to show, a considerable body of land "formed by accretion. This land was low and marshy, "but at certain seasons of the year it became dry, grass "grew upon it, hay was cut, and horses and cattle were "pastured there. Walker conveyed the tract as en-"tered by him to the defendant, who, claiming that "the entry covered this land formed since the survey, "entered into possession, the plaintiff's title was de-"reigned from an entry made subsequent to "the defendant's, which in terms covered the new "land. He having made out a title the defendant sought "to avoid it by showing his prior entry and patent claim-"ing that they covered the premises." * * * "The "patent and deeds under which the defendant claims do "not pass the title to the premises in question, unless, at "the date of the entries under which they issue, the Rock "river, where it is called a river and Lake Koshkonong "where it is called a lake, extended to and bounded upon "the meander line which constitutes the boundary of the "lands described in the patents. In other words, if, be-"tween the meandered line, which by the Government "survey was made one of the boundaries of the land sold "to Walker and the bank of Rock river and the shore of "Lake Koshkonong, there was at that time a body of "swamp or waste lands or flats on which timber and "grass grew and horses and cattle could feed, and hay

"be cut, then the patents to Walker did not cover this "land, but were confined to the actual limit of said mean- "dered line. On the other hand, if when the entries "were made, the bank of the river and shore of the lake, "at an ordinary stage of water were where the meandered "line was represented by the United States survey, and "the land in controversy has since been formed by a re- "ceding of the water or by accretion to the shore and "bank, then it became the land of the defendants or of "Walker, as the title might be in the one or the other. "If the first of these propositions be found by you to be "true the defendant has no title to the land; if the sec- "ond be true he has title to the addition made by the "accretions."

Granger v. *Swart*, 1st Wolworth, 90.

This was an action of ejectment and the verdict of the jury was for the plaintiff, thus finding the title deraigned under the junior survey to these lands between the meander line and waters of the lake and river valid.

This case differs from the one at bar only in this, that the lands involved in this suit, and which are under contention, existed at the time of the survey, and were not formed by accretion after the survey and before Holbrook entered the fractional tracts and received his patent or at any other time. The case at bar is, therefore, a much stronger case than that of *Granger* v. *Swart*.

The case of *Lammers* v. *Nissen*, however, 4 Neb., 245, is precisely like the case at bar. The land in question, in that case, lay upon the west bank of the Missouri river. The original survey was made by one Cook, as goverment surveyor, in November, 1858, who ran a meander line, and represented it upon the map returned

to the Land Department, as running along the bank of the Missouri river, upon which map no reference is made to any land lying outside of the meander; but the Missouri river was represented as coming up to this meander line. The plaintiff entered lot one (1), on the inside of and adjacent to the meander line, in 1861. The evidence in the case showed that at the time of the survey there was from eight hundred to one thousand acres of land between this meander line and the actual bank of the Missouri river, consisting of marshy land; that this tongue of land outside of the meander line was separated from the meander line by a slough, through which the waters of the river would flow; that the meander line was run along the west bank of the slough; that upon portions of the tract cotton-wood and willow trees grew; that this marshy tract or tongue of land was subject to overflow at times of high water. In 1869 the Government caused a survey to be made of this tract lying outside of the meander line, and the survey and plat thereof were approved by the Government, and the defendants subsequently pre-empted and acquired patents under the latter survey. The maps and field-notes of the two surveys were in evidence. It was contended in that case, as in this, that the plaintiff, having acquired title to lot one (1) of the first survey, bounded by a meander line, represented on the plat, approved by the Government as being upon the bank and at the water's edge of the Missouri river—a navigable body of water—the plaintiff took to the actual bank of the river and the water's edge, and that the junior survey and patents, according to the survey, were void. In deciding the case, the Supreme court of Nebraska say (4 Neb., 251): "Another inquiry "involved in the consideration of the case is as to

"what is the effect which a meandered line, purporting "to have been run along a bank of a stream, may "have, in regard to the lands at the time lying be- "tween it and the bank of the stream, and remaining unsurveyed. And in respect to this inquiry I think it sufficient to observe that as to public lands of the United States, conceding the rule to be well settled that a meandered line bordering on the bank of a stream, is not to be considered as the boundary of the tract, but simply as defining the sinuosities of the banks of the stream, and as a means of ascertaning the quantity of the land in the fraction subject to sale, yet the question whether such line does in *fact* define the sinousities of the bank of the "stream or not is one which may be determined by *evi-* "*dence aliunde.* The mere fact that it is run and is designated "upon the plats as a meandered line certainly cannot be "conclusive in the matter. To establish the doctrine "that such meandered line is conclusive, would estop the "government from disposing of lands left unsurveyed be- "tween such line and the bank of the stream; it would "prevent the correction of mistakes made by surveyors "in such case, and would be in direct conflict with the "well settled rule of law defining what is an accretion to "land. In *Granger* v. *Swart*, *supra*, the principle is "enunciated that if between the meander line, by which "the government survey was made, and the bank of the "river, there is, at the time, a body of swamp or waste "lands or flats, on which timber and grass grew, and "horses and cattle fed, then the patents would not cover "this land, but must be confined to the actual limits of the "meander line, and include no more. The title of the "defendants, acquired under the junior survey to the "lands lying between the meander line and the actual "bank of the Missouri river, was, therefore, held good."

In that case, as in this, the surveyor reported to the government and it was represented upon the plat that the meander line run at the west of the marsh, and was along the banks of the Missouri river, a navigable stream; and that the intervening 1,000 acres between the real bank of the river and the meander line, as mistakenly run, was navigable water.

In that case as in this, a portion of land subsequently surveyed was occasionally overflowed by water and the surveyor mistook the real shore of the real body of water, which should have been meandered. There the Supreme court of Nebraska held that neither the federal government, nor its patentees under the junior survey, were to be prejudiced or estopped by the representations upon the government's map, above referred to, but that the junior patentees acquired a good title to the lands surveyed and patented in the later survey, and affirmed the judgment of the court below accordingly.

The Supreme court of Iowa have, also, recently held the same way in another case, which is precisely like the case at bar. The tract involved in the case of *Glenn* v. *Jeffrey*, 75th Iowa, 20, above referred to, was situated on the east side of the same river (Missouri), and the facts were substantially the same as they were in the case of *Lammers* v. *Nissen*, and are in the case at bar. Chief Justice SEEVERS, in delivering the opinion of the court, says that the court instructed the jury as follows: "Under this evidence you are instructed that the plaint-" iff has failed to show title in himself to the land claimed " by the defendant; that the plat and field notes intro-" duced herein show that lot 3 was surveyed and platted " and located upon the north side of certain water, which " was at the time of the survey supposed to be the Mis-

"souri river. It is shown by the Adkins survey, and "other evidence in the case, that lot 3 ran, not to the "Missouri river, but to the waters of a certain bayou, "and that beyond this bayou, and between it and the "Missouri river, was other land, the land claimed by the "defendant. The evidence shows that the land between "this and the river was not surveyed. * * * The "land in controversy is Lot 3 in Sec. 18, Tp., etc., and "the complainant introduced evidence showing title in "himself from the government. The only controversy is "whether the lot, as described, extended to the Missouri "river.

In commenting upon the instruction the court say:

"The evidence warranted the court in giving the instruc- "tion it did. There was no controversy as to the facts. "It is true that the government plat and field notes de- "scribed the meander line as being at the Missouri river, "and therefore, it is claimed that lot 3 extended to the "river. In fact, however, instead of running the meander "line along the river, it was run along the bayou some dis- "tance from the river. The land in question cannot be "regarded as accretion, but existed as it now does when "the survey was made. The court rightly directed the "jury to find for the defendant. The land never was, in "fact, surveyed by the government and never sold or con- "veyed to the plaintiff."

In the case of *Bissell* v. *Fletcher*, 19 Neb., 726, the plat and patent showed lot 3 to contain 52 60-100 acres, and to run north to the Republican river. The defendant claimed lots 6 and 7, which in fact, was land between the river and where the plat showed the bank to be.

The court say: "The contention of the plaintiff is,

" that lot 3 extends to the river; and notwithstanding the " fact that lot 3 contains all the land the plaintiff purchased " and paid for, and the effect of the extension of the line " would be to give him about 117 acres of land to which " he seems to have no equitable right, still he contends the " law declares the land to be his."

After quoting that portion of the opinion in *Lammers* v. *Nissen*, *ante*, that the mere fact that a line " is run and is " designated upon the plats as a meandered line," cannot conclude or estop the government from treating the lands between the line and the bank as unsurveyed land belonging to it, the court say: " This, we think, states the " law correctly. The rule seems to be that if, *when the* " *entry of public lands is made*, the bank of the river *at an* " *ordinary stage* of water was in fact where the meander " line was represented by the survey, and land has since " been formed by accretion, it will become the land of the " person who has title to the land immediately behind it." * * * " *But the plaintiff does not claim the land in* " *controversy as an accreation, and has no right or title to* " *lots 6 and 7, as a part of lot 3.*"

A motion for a rehearing was made in the above case, and in October, 1889, another opinion was rendered, reported in the 43d N. W. Rep., 350, and not yet appearing in the Nebraska reports.

In this latter opinion the court say: " There is no proof " whatever that the land claimed by the plaintiff is an ac- " cretion to lot 3. In fact all of the proof tends to show " that it is not. The defendant has purchased his land, as " a part of the public domain, from the United States, and " it would be rank injustice to rob him of his property, " and give it to the plaintiff, who is already in possession

"of all of the land that he purchased and the government "sold to him.

"In addition to this, the official acts of public officers "will be presumed to have been lawfully performed, un- "less the circumstances of the case overturn this pre- "sumption; and acts done, which presuppose the exist- "ence of other acts, to make them legally operative, are "assumptive proof of the latter.

"*Bank* v. *Dandridge*, 12 Wheat., 70.
"*Coombs* v. *Lane*, 4 Ohio St., 112.
"*Ward* v. *Barrows*, 2 Ohio St., 241.
"*Tecumseh Town Site Case*, 3 Neb., 284.

"In the case at bar the proof tends to show that the "United States caused the defendants' land to be surveyed, "and offered the same for sale, and that the defendant or "his grantors became the purchasers. If this is correct, "the presumption is that the land in question was lawfully "surveyed and sold, and the burden of proof is on the "plaintiff to show, not only that the defendants' land is an "accretion to lot 3, but that the same was surveyed and "sold without authority of law, and in violation of his "rights.

"That a mistake was made in the original plat of the "government surveys there is no doubt, but *the plaintiff* "*has sustained no loss* by such mistake, and therefore, is "not in a condition to complain. It is evident that justice "has been done in the premises."

In *Hardin* v. *Jordan*, 16 Fed. Rep., commencing at bottom of page 826, Judge BLODGETT said: "I think, "however, that *the natural physical facts must control*, "*even against this plat*, by which it may be said Hol- "brook purchased; that is to say, there is and was at the "time of the survey two lakes instead of one.

"There was a ridge, substantially dry, separating them,
"and this ridge was never surveyed.

"The government had the right, in 1874, to survey this
"dry ridge, which had never been surveyed, and put it on
"the market and sell it."

In that case, on that trial the shallowness and non-navigability of Hyde lake was not proven, and as to the bed of that lake, the judge assumed from the plat its navigability contrary to the fact, and applied the law of navigable waters. In the second trial before Judge Gresham, it was proven and held non-navigable, and so specially found by him as we have shown, and Jordan recovered not only the ridge but the bed of the lake. That appears from the transcript of the judgment and findings of the court, in evidence in this case.

Upon these authorities it must be concluded that this body of land, existing at the time of the survey of 1835, and most certainly at the time of DeWitt and Holbrook's entries, and extending continuously southwesterly to the high land at the south of Wolf and Hyde lakes formed no part of the fractional south-west quarter of fractional sections 19, 20 and 30, which were patented to DeWitt and Holbrook, but that those lots were limited to the meander line forming its boundary.

In addition to the above cases of *Granger* v. *Swart; Lammers* v. *Nissen*, and *Glenn* v. *Jeffery*, the case of *Martin* v. *Carlin*, 19 Wis., 454, is in point. In the latter case, also, the plat was erroneous in representing Rock river to be where it was land and not river at the time of the survey, and the plat was disregarded.

The conclusion is, therefore, irresistible that as to this body of land, the title remained in the government un-

affected by the survey of 1835, and that the patents to Condit, Field, Farrand, Rushmore and others of this omitted tract of government land passed to them a perfect title thereto, which was, as found by the court, vested in Jordan.

D. This discussion has proceeded thus far without regard to whether the sheet of water, now known as Hyde lake, was or was not, at the time of the survey of 1835, navigable water. The case in 1st Wolworth was situated, in part at least, upon Rock river, a stream. The case does not state whether navigable or not. The cases of *Lammers* v. *Nissen*, and *Glenn* v. *Jeffrey* were both upon a navigable river.

It may be contended on the other side that while the contention as to the uncovered land, when the survey of 1835 was made, and De Witt and Holbrook made their entries, may prevail, yet that those portions of sections 19, 20 and 30, which are covered by shallow water, when at datum, and those portions of section 29, which are in like manner covered by the waters of Wolf lake, as it now exists, did not pass to the patentees under the survey of 1874.

I have already stated and will not repeat it, that the proof and findings show conclusively that when the survey of 1835 was made, and DeWitt and Holbrook made their entries, Hyde lake, so-called, was non-navigable. It is not material in this case whether portions of Wolf lake were then navigable or not. There is no right asserted, in this case, which could prevail with respect to the title to that portion of Wolf lake, as it now exists, and is situated upon the east half of 29, if it was true, as we have contended, that this body of land then existed to the west of Wolf lake and remained unsurveyed, the

title of which was in the government. The section line between sections 29 and 30 does not, at any point, except for a short distance at the north end, run into Hyde lake. The only portion of the bed of Hyde lake, therefore, as to which the question of navigability or non-navigability, at the time of the survey of 1835, is pertinent, is the west half of the south-west of 20, and a small area adjacent to it on 29.

In the foregoing cases of *Lammers* v. *Nissen* and *Glenn* v. *Jeffrey*, the field notes, as well as the map, showed the meander line as run at the water's edge. On the contrary, in this case, although the map returned by the surveyor does not show the meander line, yet the field notes, which are offered in evidence, do show that this meander line was made up exclusively of right lines running from station to station upon stated courses, and that the stations were, many of them, distinguished by monuments, such as various kinds of timber; and, the soil over which these right lines were run is described in the notes.

The general principles of riparian rights are not controverted.

There ought to be no contention, but that a riparian owner upon navigable salt or fresh water, or navigable rivers within the ebb and flow of the tide, takes only to the water's edge.

That the title to the soil under such navigable waters in the United States, in the absence of any grant or patent, is in the several states where those bodies of water are situated, and that, as to such waters, the state is a trustee for the public for the purposes of maintaining the public right of navigation.

3 Kent Com., 427.

That riparian owners on navigable rivers, above the ebb and flow of the tide, and upon non-navigable streams also, take to the center thread of the river or stream.

Diedrick v. *The N. W. R. R. Co.*, 42 Wis., 262.

R. R. v. *Schurmier*, 7 Wall., 272.

Braxton et al. v. *Bressner*, 64 Ill., 488.

This much of the ground covered by the law of riparian rights ought not to be the subject of contention, and the authorities bearing upon any of these propositions have no place in this case. We have no contention with the other side with respect to these general principles of the law of riparian rights.

E. But it may become material to consider *what the rule of law is as to non-navigable lakes and ponds, confessedly neither streams nor rivers.*

It is the established law in the State of Illinois:

THAT WHERE LAND IS CONVEYED OR GRANTED ALONG OR UPON A NATURAL LAKE OR POND, THE CONVEYANCE OR GRANT EXTENDS ONLY TO THE WATER'S EDGE.

There ought to be no contention with respect to the correctness of the rule adopted by the Supreme court of the State of Illinois in the case of the *Trustees of Schools* v. *Schroll et al.*, 120 Ill., 519, drawing the distinction between the rule of riparian rights, as applicable upon a stream or river, and that applied where the land is situated upon a non-navigable lake.

The facts of that case are, that the lands in question were granted by the United States to the State of Illinois, as the sixteenth section, by act of Congress of April 18, 1818, for school purposes, and accepted by the state.

There was a lake on the tract known as "Meredosia "lake," connected by an outlet with the Illinois river.

In 1846, the proper school authorities, under the title acquired by the grant, platted the lands lying on both sides of the lake into lots, and sold the same.

Persons claiming riparian title under the purchasers of these lots, or some of them, entered into the possession of the bed of the lake, and claimed to own it as riparian owners. The school trustees brought this suit against the claimants to recover the bed of the lake.

In that case the Supreme court of Illinois determine the law to be in that state, that the riparian proprietor's title does not extend beyond the shore, and that this rule applies where land is conveyed, bounded along or upon a natural lake or pond. The court in that case, say: "An "entirely different rule applies when land is conveyed "bounded along or upon a natural lake or pond.

"*In such case the grant extends only to the water's edge.*"

There is no ground for contention that the sheet of water, known as Hyde lake, was at the time of the survey of 1835, or has ever since been, navigable water, or that it was or has been a stream.

The courts and text-writers have often defined what constitutes navigable water. Those bodies only are navigable, which are navigable *in fact* for purposes of commerce. The public right of navigation is limited to those streams and other bodies of water which are capable of public use. Gould on Waters, section 43 (p. 97) and note, and authorities. Also same author, section 54 (page 115) and note, and section 72. *McManus* v. *Carmichael*, 3 Iowa, 1; *Colchester* v. *Brooke*, 7 O. B., 339; *Mayor of Lynn* v. *Turner*, 1 Cooper, 86; *Miles* v. *Ross*,

5 Taunt., 706; *Rex* v. *Montagu*, 4 B. C., 598. Gould on Waters, section 43, page 97, says: If a channel connecting with navigable water, "is a small creek, navigable "only at exceptional and extraordinary times, or at cer- "tain states of the tide, and then only for a short time "and by very small boats, its adaptability for general use "is strong, if not conclusive, evidence against the exis- "tence of a public right." In a note to the section, the author adds: "It is now settled that the public right is "limited to those streams and inlets which are capable "of public use." In the case of *The Monticello*, 20 Wall., 439, Justice DAVIS, delivering the opinion of the Supreme court said: "This court held in the case of *The* "*Daniel Bell*, (10 Wall., 557) that those rivers must "be regarded as navigable rivers in law which are navi- "gable *in fact*. And they are navigable in fact when "they are *used*, or are susceptible of being used in their "ordinary condition, as highways for commerce, over "which trade and travel are or may be conducted in the "customary modes of trade and travel on water. And "a river is a navigable water of the United States, when "it forms by itself, or by its connection with other waters, "a continued highway over which commerce is or may "be carried on with other states or foreign countries in "the customary modes in which commerce is conducted "by water." Such is the rule in this country.

Rowe v. *Granite Bridge Company*. 21 Pick., 344.

Charleston v. *County Commissioners*, 3 Met., 202.

Attorney General v. *Woods*, 103 Mass., 437.

United States v. *New Bedford Bridge*, 1 Wood and M., 401.

Weathersfield v. *Humphry*, 20 Conn., 218.
Grotin v. *Hurlburt*, 22 Conn., 178.
Burrows v. *Gallup*, 32 Conn., 501.
Brown v. *Preston*, 38 Conn., 219.
Glover v. *Powell*, 10 N. J. Eq., 211.
Flannagan v. *Phil.*, 42 Penn. St., 219.

The evidence in this case shows that the bed of Hyde lake, except as to a very small area on the west side of the lake, extending from about the half section east and west line on section 20 to below the half section, east and west line on section 30 (this being the northerly and southerly limits of Hardin's fractional tracts on sections 19 and 30), is, and probably always has been, above datum, and that the excepted portion, above indicated, will not average six inches below datum.

The waters are supplied by rain fall, within the watersheds, the melting of ice and snow and by springs in the bottom of the lake. There is no current or thread to it. The waters cannot flow out until they rise above the western rim of the lake and cannot flow in until the excess of waters, accumulated by reason of freshests, rainfall or winds, rise above this rim. When the former occurs there is a temporary flow from the basin over the rim. In the latter case there is a temporary flow in the reverse direction. Waters are only thus moved temporarily in divers directions and by the winds brought to bear upon the surface of the water. This makes Hyde lake clearly fall within the definition of non-navigable ponds and lakes, and within the rule applied by the court in the Meredosia lake case, which was held to be a lake and not a part of the Illinois river, and which ruling is supported by all of the authorities.

Gould says: "A river is a running stream of water "pent in on either side by banks, shores, or walls. * * * "Every river consists of: (1) the bed; (2) the water; (3) "the banks or shores; and it also has a current. It is a "river or water course from the point where the water "comes to the surface and begins to flow in a channel "until it mingles with the sea, the arms of the sea, lakes "etc. It may sometimes be dry, but in order to be with- "in the above definition it must appear that the water "usually flows in a particular direction, and has a regu- "lar channel; with bed, banks, or sides." * * * "The "bed, which is a definite and commonly a permanent "channel, is the characteristic which distinguishes these "waters from mere surface drainage, flowing without a "defined course or certain limits, and from water perco- "lating through the strata of the earth, both of which are "not subject to riparian right, but form part of the realty "and belong exclusively to the owner thereof. The fact "that these waters have a current gives rise to questions "relating to the obstruction and acceleration of the waters "which do not arise in the case of still waters, like lakes "and ponds. A stream necessarily involves the idea of a "*current;* and a statute which provides for bridges over "streams separating towns confers no authority to con- "struct bridges over lakes, bays or marshes, in which the "water has no preceptible flow."

Gould on Waters, Sec. 41.

All these positions in the text are well supported by reference to numerous cases.

On the other hand, the same author defines lakes and ponds thus: "Fresh water lakes and ponds are bodies of "standing water distinguishable from rivers chiefly by "the fact that they have no current." * * * "The

"fact that there is a current from a higher to a lower "level does not make that a river which would otherwise "be a lake, nor does a lake lose its distinctive character, "because *there in a current to it for a certain distance "tending towards a river* which forms its outlet. On the "hand, the fact that a river broadens into a pond like "sheet with a current does not deprive it of its character "as a river."

Gould on Waters, Sec. 79.
Angell on Water Courses, 7th Ed. 4f.

These positions of the text are fully supported by the cases cited in support, among which is the case of the *State* v. *Gilmanton*, 9 N. H., 463; and 14 N. H., 476.

These authorities certainly justify the court in the Meredosia lake case in finding it a lake and not a stream.

But the special finding of the court in the case at bar, that "the land and water are substantially what they "were at the time of the original survey, and that the "lake or lakes are non-navigable waters," is conclusive upon this question.

Certainly if Meredosia lake was a lake within these authorities, Hyde lake is. The differences between the two bodies of water are that Hyde lake is less than two miles long and a half a mile wide, while Meredosia lake is five or six miles long and in places a mile wide; that Meredosia lake is in close contiguity with the Illinois river, a navigable stream, while Hyde lake is some four or five miles from Lake Michigan and eighty to 100 rods from the Calumet river, both navigable bodies of water, in both cases connection being made from an "outlet" to the Illinois river in the one case, and to the Calumet river in the other, and that as the court states, it did not appear

whether portions of Meredosia lake was in fact navigable, while it does appear, in this case, that the bed of Hyde lake in the lowest part is very near "datum."

In the two cases, these bodies of water are without current, but during portions of the year currents of water pass through their outlets to the Illinois and Calumet rivers respectively, but the flow of water from the lakes is sometimes "stopped in summer." Both lakes receive their supply of water from springs in their beds, rainfall and melting ice and snow, but, in their natural state, from no other independent body of water.

It is clear, therefore, that Hyde lake, within the rule adopted, or rather followed, in the Meredosia lake case is a non-navigable lake and not a stream. This is not controverted.

Hyde lake, therefore, being a non-navigable pond or stream at the time of the survey of 1835, the question arises whether or not the title to any portion of this lake bed became subject to the riparian claims of any of the owners of fractional lots under that survey. It is clear from the authorities that it did not, but that like the uncovered lands, which existed at the time of that survey, the title remained in the Government of the United States.

F. *The bed of Hyde lake being non-navigable did not pass to the State of Illinois, as the trustee for the public, and conservator of the right of public navigation.*

The title to so much of this lake bed as is contained in sections 19, 20, 29 and 30 passed to Jordan by *mesne* conveyances from the patentees as unquestionably as it did to that part of the tract which was uncovered at the time DeWitt and Holbrook made their respective entries.

It is competent for the government to pass title to non-navigable lake beds, and they are often the subject of private conveyance. It is a matter of very frequent occurrence that non-navigable lakes and ponds are patented and conveyed as forming parts of congressional subdivisions. The validity of these titles has been frequently declared by the courts.

It has been the uniform practice, also, of the United States Government, where non-navigable lakes and ponds have been meandered to subsequently survey and patent the lake beds.

Rogers v. *Jones*, 1 Wend., 255;
Canal Commissioners v. *The People*, 5 Wend., 448;
Smith v. *Miller*, 5 Mason (U. S. C. C.), 191;
Coovert v. *O'Connor*, 8 Watts, 470;
Angell on Water Courses, Sec. 6;
Ledyard v. *Ten Eyck*, 36 Barb., 102.

In the case of *Ledyard* v. *Ten Eyck*, 36 Barb., 102, it was held that a patent which embraced within its description a portion of Cazenovia lake carried the title to the bed of the lake covered by the description to the grantor.

In the case of *Rogers* v. *Jones*, 1 Wend., 255, the court had said: "It cannot be doubted, that when a patent or "grant conveys a tract of land by metes and bounds, the "*land under water* as well as other land will pass, if the "land under water lies within the bounds of the grant. "A contrary doctrine would exclude the lands under the "water of lakes and streams not navigable. Scarcely a pat-"ent ever issued in this state, that does not include one or "the other; and so far as I know, no question has ever

"been raised on this ground. The authority cited from "2 Black. Com., 19, does not bear out the position, but "establishes the contrary. The author states, that if a "man grants his lands he grants all his mines, woods, "*waters*, etc., as well as his fields and meadows."

In the case of *Canal Commissioners* v. *The People*, 5 Wend., 448, Chancelor Walworth held, that waters and islands in rivers, which were included within the bounds of the Van Rensselaer's patent and in terms granted were passed to the patentee and his assigns.

In the case of *Smith* v. *Miller*, 5 Mason, 191, the plaintiff claimed as lessee for 500 years of a dam or pond "together with all the land, which may be flooded by "raising said dam seven feet high from the bed or bottom "of the river."

In deciding the case Justice STORY said: "The lease "having conveyed all the land *under the pond*, it passed "the pond of water and the fish therein to the plaintiff, "*as incident to the principal grant*."

The grant to William Penn, in Pennsylvania, vested in him the title to all streams and bodies of waters not navigable, falling within the limit of his grant, and the owner could convey the stream or body of water and the title to the soil under them to one person and the adjoining land to another.

Angell on Water Courses, Sec., 6.
Coovert v. *O'Connor*, 8 Watts., 470.

In the Meredosia lake case, the court held that the title to the bed of the lake, and the lake itself, vested in the trustees of schools by virtue of the Act of Congress, granting the sixteenth section to the State of Illinois for school purposes, and the Act of the Legislature accepting

"ciently broad to embrace our large fresh water lakes, "or inland seas, which are wholly unprovided for by the "common law of England. As to these there is neither "flow of the tide or thread of the stream, and our own "local law appears to have assigned the shores down to "the ordinary low water mark to the riparian owners."

In the case of *Champlain & St. Lawrence R. R. Co.* v. *Valentine*, 19 Barb., 490, the court say: "From the na- "ture of things, in many particulars, it is not adapted to "our lakes. The English have no large inland bodies of "stationary fresh water, or even salt, unaffected by the "tide. Nor is there anything similar to our great lakes, "in those parts of the Old World where the civil law has "prevailed. * * * Some of our judges and jurists "have not hesitated to declare an opinion, that the law "in relation to the rights of riparian owners on rivers, "above the flux and reflux of the tide, does not prevail "in our great lakes."

Similar language is held in *Kingman* v. *Sparrow*, 12 Barb., 206.

The case of *Ledyard* v. *Ten Eyck*, 36 Barb., 102, while seeming to be in conflict with these cases, by reason of *obiter dicta* is not.

In that case Cazenovia lake was treated as navigable. The state, acting as trustee for the public, lowered the outlet, and thereby made the land out of the lake bed, which was subsequently occupied by the defendant, and was the subject of litigation.

By a seeming common consent, although said not to be navigable, it was actually used by the public.

In the case of *Waterman* v. *Johnson*, 13 Pick., 265, the land involved was bounded by a natural pond. Chief

the grant. In that case the school trustees recovered the lake.

In this the court was fully justified by the authorities which I have above quoted. On the same principle Hyde lake, being a non-navigable lake, the patents to Farrand, Rushmore, Condit and others vested in them an absolute title, not charged with any public or private easement or use, and through them in Jordan. Being non-navigable, there was no public right of navigation, and they could be charged with no easement, because an easement in non-navigable waters cannot exist, except by grant or prescription, neither of which is claimed or can be claimed in this case.

Cook v. *Stevens*, 11 Mass., 533.
Stevens v. *Stevens*, 11 Met., 255.
Gould on Waters, Sec. 300, note 3.

G. The principle announced, as we have seen, by the court, in the Meredosia lake case, *that shore owners on ponds and non-navigable lakes are limited to the water's edge*, is fully sustained by the most trustworthy and reliable line of authorities.

In *Wheeler* v. *Spinola*, 54 N. Y., 385, the court say: "Neither can the rule as to riparian ownership be ap-"plied to this pond which is applied to ordinary fresh "water streams. A boundary upon it does not carry "title to its center, but only to low water mark. Such "is the rule as to boundaries upon natural ponds or "lakes."

It was said by Chancellor Walworth in *Canal Commissioners* v. *The People*, 5 Wend., 446, speaking of the rule that riparian owners on streams take to the center thread "the principle itself does not appear to be suffi-

Justice SHAW, in delivering the opinion of the court, says: "A large natural pond may have a definite low "water line, and then it would seem to be the most nat- "ural construction, and one which would be most likely "to carry into effect the intent of the parties to hold, "that land bounded upon such a pond would extend to "low water line."

In the case of the *Inhabitants of Roxbury* v. *Stoddard, et al.*, 7 Allen, 167, the court say: "The rules of law "which apply to questions of boundary on rivers have "never been considered applicable to the great lakes, or "fresh-water pounds. The boundary on a natural pond "extends only to low-water mark."

In the case of *Paine* v. *Woods*, 108 Mass., 170, the court, speaking by Justice Gray, now of this honorable court, affirms the doctrine that a grant bounded by a pond or lake extends to low water mark, citing the opinions of Chancellor Walworth in *Canal Commissioners* v. *People*, 5 Wend.; Chief Justice Shaw in *Waterman* v. *Johnson*, 13 Pick., Justice Hoar in *West Roxbury* v. *Stoddard*, 7 Allen, and other cases.

That the shore owners did not take title to the bed of the pond involved was held in *Hittinger* v. *Eames*, 121 Mass., 546.

In the case of *Primm et al.* v. *Walker*, 38 Mo., 99, the court say: "Doubtless, when the call is for a pond "merely, or for metes and bounds along the bank of a "river, the margin of the pond at low water, or the edge "of the bank, on many authorities, is to be taken as the "boundary."

In the case of *Bradley* v. *Rice*, 13 Mo., 201, the court say: "Had the land been bounded upon a river or

"stream, or upon an artificial pond created by expanding "a stream by means of a dam, the riparian proprietor "would go to the thread of the stream. This is law well "settled and understood.

"But it has not been so settled with regard to ponds "and lakes. Nor are we aware, that there can be one "construction for small ponds or lakes, and another for "large ones. Where shall the line be drawn?"

This principle was recognized by the same court in *Nelson* v. *Butterfield*, 21 Mo., 229. In that case there was an arm or cove running across the land from the pond, and the principle was carried out by treating this arm or cove as not a part of the body of the pond and thus giving effect to the clear intention of the parties expressed in the conveyance.

In the case of *Wood* v. *Kelley*, 30 Mo., 53, the land involved was bounded "easterly on said south pond."

"South pond appeared to be a natural body of fresh "water, the height and extent of which had been in- "creased for more than twenty years before the com- "plainant purchased his land bounded upon it."

The jury were instructed that the complainant acquired a title to the land bounded upon the pond, to the margin of the pond at low water mark, considering the pond to be permanently enlarged by reason of the mill-dam.

The court sustained this instruction.

In *Robinson* v. *White*, 42 Mo., 218, it is said: "When "land is bounded upon a lake or pond, if it is in its nat- "ural state, it would seem that the grant extended only "to the water's edge."

The court say, in *Mansur* v. *Blake*, 62 Mo., 41: "Where land is bounded by a pond in its natural state,

"the grant, it would seem, extends only to the water's "edge."

In *The State* v. *Gilmanton*, 9 N. H., 463, the court say: "When a grant is made extending to a river, and "bounding upon it, the centre of the stream is the line "of boundary, if there is no limitation in the terms of "the grant itself.

"But in relation to grants bounding on ponds, lakes or "other large bodies of standing fresh water, that prin- "ciple does not apply, but the grant extends only to the "water's edge."

In *Fletcher* v. *Philips*, 28 Vt., 268, after stating the rule as to streams, the court say: "A different rule pre- "vails where land is conveyed bounded on large natural "ponds or lakes; in such case the grant extends to the "water's edge, or if, as observed by Ch. J. Shaw, in "*Waterman* v. *Johnson*, 13 Pick., 261, the lake or pond "have a definite low water line, the grant will extend to "low water." The tract involved in this case was upon the shore of Lake Champlain.

In the case of *Jakeway* v. *Barrett*, 38 Vt., 323, the tract involved also lay near the same lake.

Plaintiff and defendant owned contiguous tracts. Defendant and his grantors had occupied and cut hay on about five acres of land lying between low and high water marks, for a period of time sufficient to bar an action.

The court held that the plaintiff's land was limited to the high water line, and that the defendant's occupancy of the land in dispute, claiming the same under his deed, although not in fact embraced therein was a bar to recovery.

In *Austin et als.* v. *Rutland R. R. Co. et als.*, 45 Vt., 242, it is said there is no *common law* of Vermont, by which the owner of land bounded on Lake Champlain has a right beyond low water mark to appropriate as his own the bed of the lake. Neither the legislature nor the courts have recognized any such right.

The same rule is held in Wisconsin. In *Mariner* v. *Schulte*, 13 Wis., 698, Chief Justice Cole affirmed an instruction of the inferior court which instructed a jury that such was the law.

Thus this line of authorities, followed by the Supreme court of Illinois in the Meredosia lake case, establishes the rule as claimed by us and as laid down by that court.

Many of the authorities, which are given on the other side and claimed to establish a different rule, are cases where the entire shore on all sides of the lakes and ponds in question are held by the same person, or where the area of the non-navigable lake or pond was estimated and paid for as a part of the lands granted or patented. While contending that there is no analogy, or authority, from any of the English cases for such a rule, because of absence of such bodies of water in England, and because the rule claimed in these cases is one applied to navigable and not to non-navigable bodies of water, the most that can be contended for with respect to these conflicting cases is that they constitute an exception to the rule and not the rule itself. This question is fully discussed and clearly decided by Judge Gresham in the case of the *State of Indiana* v. *Milk*, 11th Fed. Rep., 395. He says: "Non-navigable streams are usually narrow, and the "lines of riparian owners can be extended into them at "right angles without interference or confusion, and with-"out serious injustice to any one. It was therefore

"natural, when such streams were called for as bound-
"aries, to hold that the real line between opposite shore
"owners was the thread of the current. The rights of
"the riparian proprietors in the bed of the stream, and in
"the stream itself, were thus clearly defined. But when
"this rule is attempted to be applied to lakes and ponds,
"partial difficulties are encountered. They have no cur-
"rent, and being more or less circular, it would hardly
"be possible to run the boundary lines beyond the
"water's edge, so as to define the rights of the shore
"owners in the beds. Beaver lake is seven and a half
"miles east and west, and less than five miles north and
"south. Extending the sides and end lines into the lake,
"there being no current, where would they meet? This
"rule is applicable, if at all, whether there be one or
"more riparian proprietors. I do not think the mere
"proprietorship of the surrounding lands will, in all cases,
"give ownership to the beds of natural non-navigable
"lakes and ponds, regardless of their size. It would be
"unfair and unjust to allow a party to claim and hold
"against his grantor the bed of a lake containing thous-
"ands of acres, solely on the ground that he had bought
"and paid for the small surrounding fractional tracts—
"the mere rim.

"A person might, by purchasing the lands surrounding a
"small lake, in view of its size and other circumstances, be
"held to own the bed. Each case depends largely on its
"own facts. *Forsythe* v. *Smale*, 7 Biss., 201."

While a general grant of land on a river or stream, non-navigable, extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge.

It is the established doctrine of the Supreme court of the

United States, that the Supreme court of each state may determine for each state the rule which it will adopt with respect to riparian rights upon non-navigable waters within the several states of individul contestants. *Barney* v. *Keokuk*, 94 U. S. (4 Otto), 228.

H. *Whether, therefore, the mathematical line run by the surveyor as established by the monuments at the intersection of section lines, or the water's edge at high, low or ordinary stage of water was the real boundary, the title acquired by the patentees of the fractions was limited to the boundary line and no riparian rights are involved.*

The well recognized rule that distances and courses must yield to monuments and natural objects, where the two conflict, and that other rule, which the courts have sometimes adopted, that where a meander line is run along, or near, a body of water, the boundary should be taken to be the water's edge, and the fiction entertained (which is believed to be limited to the meander of navigable bodies and streams) that the line is run by the surveyor for the ascertainment of the quantity of land merely relate only to *boundaries* of tracts surveyed, and neither imply nor admit any rights to the patentees beyond the *boundary line.*

The question whether the patentee has any riparian rights is entirely distinct and independent from the question as to *where the boundary of his tract is.*

It is a well established principle that riparian rights are entirely independent of the title to the soil under the water. As is said in *Diedrich* v. *The N. W. Ry. Co.*, 42 Wis., 262: "Riparian rights proper are held to rest "upon title to the *bank* of the water, and not upon title "to the *soil under the water;* riparian rights proper being

" the same, whether the riparian owner owns the soil " under the water or *not*. And distinguished from the " right arising in case of gradual and insensible accretion " or reliction, the general right of *appropriating* and " *occupying the soil under the water*, when such right may " exist, is not properly a riparian right; resting *not* upon " title to the *bank* only, but more directly *upon title to the* " *soil itself under the water*. * * * The rule that the " right of appropriation and occupation of the bed of the " water, when such right exists, *rests upon title to the bed* " *of the* water itself, and *not* upon title to the bank only, " appears to be a principle nearly self evident. * * * " When the water is *not* navigable (as is the case with " respect to Hyde lake and ever has been), *the public* " *has no easement;* and the riparian owner" (if the title to the bed is also in him), " may, in general, put his " estate *under the water* to any proper use he may " please."

Whether then the patent issued to Holbrook conveyed to the mathematical meander line, as shown by the field notes, or to the water's edge at the time of the survey, or the purchase by Holbrook, the bed of Hyde lake did not pass nor was its waters charged with any easement or use, public or private, and the only difference it would make by giving the one construction or the other would simply relate to the margin of the land at such time lying between the mathematical meander line and the edge of the water.

That it is difficult to furnish evidence as to where the line of water would be, or was when the meander line was run, is no objection to the position, because the difficulty of obtaining proof is not an argument against the application of a rule at law. Difficulties of that sort are

met and overcome by the courts, as best they may be, in every day's practice.

The rule would seem to be, where courts have applied it, that where riparian rights exist the water's edge at the time the purchaser from the government acquired title, is the boundary line. The existence of riparian rights here is admitted only for the sake of argument.

In this case there could be no serious difficulty, because so far as relates to the water boundary on Hardin's fractions in the north half of 30 and the south half of 19, the plat would seem to show that the water came up to the meander line, and that the two coincided upon these tracts. The presumption, therefore, would be, until overthrown by Hardin by proof of a margin up to the time Holbrook took his patent, that the water line and the meander line coincided as the eastern boundary of these fractions. So far as the north line of the south-west quarter of section 20 is concerned, the plat shows water to have extended beyond that quarter to the north for some distance, so that the difficulty suggested in no event would arise in this case.

Counsel for plaintiff entirely agree with us in both, that the state has no easement in Hyde lake, and that the title in the owner of the soil under the lake is proprietary. The only contention on his part being that that proprietary title belongs to his client and not Jordan, while our contention is that Jordan is the proprietary owner discharged from all public and private easements.

If, however, it had been made to appear as a fact, that at the time Holbrook purchased these tracts on 19 and 30, there was a margin between the meander line, as actually run, and the water, and Holbrook should be held to

have taken by his patent to the water's edge, there would simply as to this margin be an overlying and an underlying patent, in which case, as to such margin, the earlier patent would prevail, but such a contingency would in no wise affect the validity of the junior patent beyond the boundary line of the tract granted to Holbrook. On the contrary, the patent under the survey of 1874 would carry a perfect title from the boundary line of lands granted in the Holbrook patent. The land adjacent to the DeWitt tract, running south continuously to the southwest corner of 29, between Wolf and Hyde lakes, as lands omitted, could only be regarded in any case as the unsurveyed land of the United States.

In conclusion, upon this branch of the case, we have shown that these lands were omitted from the survey of 1835 by mistake or negligence, within the cases of *Lammers* v. *Nissen* and *Glenn* v. *Jeffrey;* that the meander line should either have been run along the margin of Wolf lake as it then existed and still exists, including in the survey of 1835 the large tract of land between Wolf lake and the sheet of water known as Hyde lake; that it being shallow water, and the bottom being generally about datum, and none of it but a few inches below, the title remained in the government; that as to such portions of the west side of Wolf lake as are involved in this suit, Hardin cannot question the right of Jordan; and that as to the same, and as between them and the government patenting these lands and receiving their money, their titles are good; and that, therefore, in any view which may be taken of this branch of the case, these lands belonged to the United States at the time of the survey of 1874. It should be observed, also, that this, in any sense, was not a re-survey. The survey, made by Wolcott, re-established the

old meander line precisely where it was run in 1835. He found all of the monuments on the meander line, shown by the old field notes. The other lines were the extension of the east and west, north and south lines of the old survey made by actual measurements, and the establishment of the corners shown in the latter survey.

II.

HARDIN AND DEWITT HAVING BEEN NOTIFED, AND HAVING APPEARED BEFORE THE REGISTER AND RECEIVER OF THE LOCAL LAND OFFICE; HAVING APPEALED TO THE COMMISSIONER OF THE GENERAL LAND OFFICE; AND FROM HIS DECISION TO THE SECRETARY OF THE INTERIOR; AND CONTESTED IN THE LAND DEPARTMENT, BEFORE THESE OFFICERS OF THE GOVERNMENT, THE QUESTION WHETHER OR NOT THE LANDS EMBRACED IN THE SURVEY OF 1874 BELONG TO THE GOVERNMENT; AND THE DECISION OF THE SECRETARY OF THE INTERIOR, THE HIGHEST AUTHORITY IN THE DEPARTMENT, HAVING BEEN ADVERSE TO THEM; AFTER SUCH A CONTEST AND THE QUESTION HAVING BEEN DECIDED UPON EVIDENCE ADDUCED, BEARING UPON THE QUESTION AS A FACT, THEY AND THEIR GRANTEES ARE ESTOPPED BY THE DECISION OF THE SECRETARY OF THE INTERIOR FROM AGAIN CONTESTING THE QUESTION IN THE COURTS.

The proof in this case shows that DeWitt and Hardin were notified by the register and receiver of the local land office, of the filing of the survey, and the hearing upon the application of the claimants of these lands; and that they appeared and put in issue, in writing, and in-

sisted upon a decision, before patents should issue, whether these lands had not passed under the Holbrook and DeWitt patents, and did or did not belong to the United States. Proof was introduced before the register and receiver of the local land office, as to the physical conditions and changes in the tract involved in this suit, at and since the time when the Holbrook and DeWitt patents were issued; and an issue of fact was formed and tried, *necessarily including the issue whether this lake was navigable in fact*, and the local land officers found the issue adversely to the claims of Hardin and DeWitt thereon. From that decision Hardin and DeWitt appealed to the commissioner of the General Land office, and the question was decided by the commissioner upon that appeal, in 1878, to the effect, that these lands involved in this suit belonged to the United States, and were patentable. From this decision of the commissioner, DeWitt and Hardin again appealed to the Secretary of the Interior, and in May, 1880, the Secretary Schurz affirmed the decision of the commissioner of the General Land office. This decision of the Secretary of the Interior—the head of the land department—was never appealed from and remains in force.

It has long been the established doctrine of the Supreme court of the United States, that the decisions of the Land Department necessarily made, within the legitimate limits of proceedings in that department, in the acquirement of title to the public lands, under the various modes provided by statute, are final and conclusive upon the parties, and cannot be again drawn in question. In the case of *Johnson* v. *Towsley*, 13 Wallace, 83, the court said: "That the action of the land office in issuing a "patent for any of the public land subject to sale by pre-

"emption or otherwise, is conclusive of the legal title, "must be admitted under the principle above stated, and "in all courts, and in all forms of judicial proceedings, "where this title must control, either by reason of the "limited powers of the court, or the essential character "of the proceedings, no inquiry can be permitted into the "circumstances under which it was obtained."

In the case of *Warren* v. *Van Brunt*, 19 Wallace, 653, the same doctrine is affirmed, and the court say: "This "question has recently been fully considered by this court, "in the case of *Johnson* v. *Towsley*, and it is there held "that 'When those officers decide controverted questions "of fact, in the absence of fraud or imposition, or mis-"take, their decision on those questions will be final.'"

In the case of *Sheply et al.* v. *Cowan et al.*, 91 U. S., 340, the court again says: "The officers of the land de-"partment are specially designated by law to receive, con-"sider and pass upon proofs presented with respect to "settlements upon the public land." * * * "For "mere errors of judgment upon the weight of evidence "in a contested case before them, the only remedy is by "appeal from one officer to another of the department, "and, perhaps, under special circumstances, to the presi-"dent." The same doctrine is reaffirmed in *Moore* v. *Robins*, 96 U. S., 530, and *Marquiez* v. *Frisbie*, 101 U. S., 473.

In *Vance* v. *Van Brunt*, 101 U. S., 519, it is again said: "The appropriate officers of the land department "have been constituted a special tribunal to decide such "questions, and their decisions are final to the same ex-"tent that those of other judicial or quasi-judicial tribun-"als are." That case decides that where false testimony

or forged documents had been used, before the department, upon the issue being tried, it would not affect the binding force of the decision, were no appeal taken.

In the case of the *United States* v. *Schurz*, 102 U. S., 401, the court said: "To the officers of the land department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain." * * * "The question whether any particular tract, belonging to the government, was open to sale, pre-emption or homestead right, is in every instance a question of law as applied to the facts for the determination of these officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character. It is clear that the right and the duty of deciding all such questions belong to these officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the secretary."

In the case of *Smelting Company* v. *Kemp*, 104 U. S., 646, Justice FIELD, speaking for the court said: "A patent in a court of law, is conclusive as to all matters properly determinable by the land department, where its action is within the scope of its authority, that is, where it has jurisdiction under the law to convey the land. * * * Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it would be presumed that such circumstances existed. * * * If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or

"acted from imperfect views of their duty, or even from "corrupt motives, a court of law can afford no remedy "to a party alleging that he is thereby aggrieved."

In the case of *Steele* v. *Smelting Company*, 106 U. S., 447, the patent was assailed, because it was claimed that the same had been previously appropriated as a town site. The land department had passed upon the question as to whether or not the land was patentable, and had granted a patent to the plaintiff. The Supreme court in deciding the case (page 450) said: "Whether there "are rights thus interfered with which should preclude "the location of the mine and the issue of a patent to "him or his successor in interest, is, when not subjected "under the law of Congress to the local tribunals, a mat- "ter properly cognizable by the land department when "application is made to it for a patent, and the inquiry "thus presented must necessarily involve a consideration "of the character of the land to which title is sought, "whether it be mineral, for which a patent may issue, "or agricultural, for which a patent should be withheld. "* * * Necessarily, therefore, it must consider and "pass upon the qualifications of the applicant, the acts he "has to perform to secure the title, *the nature of the land*, "and *whether it is of the class which is open to sale.* * * * "The validity of a patent of the government cannot be "assailed collaterally, because false and perjured testi- "mony may have been used to secure it, any more than "a judgment of a court of justice can be assailed collat- "erally on like ground." (Page 453.)

The case of *Quinn* v. *Conlon*, 104 U. S., 421, was one where the officers of the land department were called upon to decide whether the lands involved were within the limits of and covered by a prior Mexican grant, or

whether by the survey of the government and the appropriation of other lands to its satisfaction, they were excluded from the operation of the grant, and open to pre-emption—or, in other words, belonged to the United States. In that case, this court re-affirmed, in the strongest language, its prior rulings on the question; and, in speaking of the land department, said: "The "alleged erroneous rulings of the officers of the land "department * * * were upon mere matters of fact, or "upon *mixed questions of law and fact, which were prop-* "*erly cognizable and determinable by the officers of that* "*department.*" * * * "For mere errors of judg- "ment as to the weight of evidence on these subjects, by "any of the subordinate officers, the only remedy is an "appeal to his superior of the department. The courts "cannot exercise any direct appellate jurisdiction over "the rulings of those officers, or of their superior "in the department in such matters, nor can they reverse "or correct them in a collateral proceeding between pri- "vate parties." * * * "The question whether the "land in controversy had been freed from its reservation "under the Mexican grant so as to be open to settlement "and pre-emption depended upon matters disclosed by "the record of proceedings in the land department, "namely, that the public surveys had been extended over "the lands, and that other lands had been appropriated to "the satisfaction of the grant."

This doctrine was again affirmed in the recent case of *Baldwin* v. *Stark*, 107 U. S., 465.

The case of *Cowell* v. *Lammers*, 21st Fed. Rep., 200 decided by Judge Sawyer, on the circuit, is in accord with this line of authorities as applicable to the question decided in this case. In that case (page 205), after

quoting from the act of Congress of 1796 the language: "These field-books shall be returned to the Surveyor-"General, who shall thereupon cause a description of the "whole land surveyed to be made out, and transmitted *to* "*the officers who may superintend the sale*," (St. P., 466 Par. 2), the court says: "The object, doubtless, is to "enable the officers in charge to determine *whether the* "*lands are patentable or not.*

"This provision has been in force ever since, and it is "carried into the Revised Statutes (section 2,396): * * * "'Thus the government has provided means to enable "the land officers *to determine the character of the land*, "and whether or not they are of the character granted "by the acts, or *authorized to be sold or otherwise dis-*"*posed of*.' Again the court says, at page 208: 'The "sooner it comes to be a generally recognized principle, "that a United Ststes patent, regular upon its face and "upon the record, issued in the form prescribed by law, "means *something*, that it is unassailable collaterally, or "or even with success directly, by parties having the "proper *status*, except upon clear and indisputable ground "and evidence, the sooner confidence in land titles will be "re-established.' "

The same principle is also affirmed by Judge Brewer, in the case of *Wright* v. *Dubois*, 21 Fed., 694.

In the case of *Sheply* v. *Cowan et al.*, *ante*, two patents had been issued for the same land, one by the State of Missouri, under a congressional grant made in 1841, and the other by the United States in 1866, upon a pre-emption claim. Other acts of Congress had been passed with special reference to the land involved, and various surveys had been made.

The land department *determined* that, notwithstanding the prior patent by the State of Missouri, under a prior congressional grant, the property *belonged to the United States*, and was subject to the pre-emption claim, and awarded a patent. The Supreme court of the United States in this case held that the decision of the Secretary of the Interior was conclusive.

Sheply v. *Cowan et al.*, 1 Otto, 340.

See, also, the recent cases of

Terry v. *Strub*, 18 Legal News, 2.

Also,

Aurora Hill Con. Min. Co. v. *85 Min. Co. et al.*, 34 Fed. Rep., 515.

In the recent case of *Cragin* v. *Powell*, 128 U. S., 593, the sourt, by LAMAR, justice, say: "That whilst the lands "are subject to the supervision of the General Land Of- "fice, the decisions of that bureau in all such cases, like "that of other special tribunals upon matters within their "exclusive jurisdiction, are unassailable by the courts, "except by a direct proceeding; and that the latter have "no concurrent or original power to make similar correc- "tions, if not an elementary principle of our land law, is "settled by such a mass of decisions of this court, that "its mere statement is sufficient."

Citing, with other cases:

Haydel v. *Dufresne*, 17 How., 23.
Steele v. *St. Louis Smelting & Refining Co.*, 106 U. S., 447.
Pollard et al. v. *Dwight*, 4 Cranch, 439.
West v. *Cochran*, 17 How., 403.
Stanford v. *Taylor*, 18 How., 409.
Gazzam v. *Phillips*, 20 How., 372.

United States v. *San Jacinto Tin Co.*, 125 U. S., 273, and
Frasher v. *O'Connor*, 115 U. S., 122.

The case at bar clearly falls within these decisions and is controlled by them. The officers of the land department necessarily passed upon the question, largely of fact, whether these lands belonged to the United States. The consideration of that question involved an examination of the records of the land department, including the field notes of the two surveys, the evidence adduced in connection with the application for the survey, the return of the officer making the survey of 1874, with the proof connected therewith as to the condition of these lands, the consideration of the evidence as to the *status* of this omitted tract, whether it was land, whether the portions covered by water were navigable or non-navigable, what changes had taken place, if any, and necessarily required them to decide a mixed question of law and fact, largely of fact, which, according to all these decisions, they not only had a right, but it became their duty to do.

That decision, as we have seen, was in accordance with the authorities, but whether it was or not it became, and ever must remain, conclusive as against DeWitt and Hardin and their grantees. The question is simply whether the land department, in the proceedings culminating in these patents, under which these defendants hold, and, to which proceeding Hardin and DeWitt were contesting parties, had jurisdiction to consider and decide the issue formed by them—whether the lands in question belonged to the United States. Had the patents to the fractional tracts purported to convey these lands, and had the acreage purchased and paid for by Holbrook and De-

Witt embraced them, the jurisdiction would not be claimed to exist. But the acreage purchased and paid for, and covered by the description in the patents, did not extend beyond the meander line.

An examination of the opinions of the commissioner of the general land office, secretaries Schurz, Kirkwood and acting secretary Bell will show that all of the claims, which are now urged in this case, including the allegations of fraud, were thoroughly considered, investigated, discussed, and, in every instance, although three different applications for rehearing were made, decided against Hardin and DeWitt. Surely the language of the Supreme court of the United States in the *U. S.* v. *San Jacinto Tin Co.*: "There must be a time when such allegations "will not be heeded. The examination into alleged "frauds, when the patents are applied for ought to close "all controversy in respect to them, clearly so unless "upon newly discovered evidence of the most convincing "character, Congress should direct proceedings to be in- "stituted to set aside the patents, and that result can be "obtained without impairing the title of innocent parties," is indeed pertinent.

In this case Jordan is an innocent purchaser, having paid large sums of money for these lands relying on the decision of the land department.

It is, therefore, contended that the decision of the land department, that these lands belonged to the United States, is conclusive upon this and all other courts.

III.

We come now to the consideration of the assignments of error, appearing in this record as grounds for a reversal of this judgment.

The first assignment questions the correctness of the rulings of the Circuit court overruling motions to remand.

On the 15th day of March, 1883, a motion to remand was denied by Judge Blodgett. (Rec., 21.) Afterwards, December 22, 1884, plaintiff confessed a demurrer filed before removal and took leave to amend the declaration, and on the 26th of the same month filed three additional counts, bringing into the case lands not involved in the suit before removal. (Rec., 22 and 23.)

On the 26th of December, 1884, he joined in the usual stipulation waiving a jury, and consenting to a trial by the court. (Rec., 24.) On the 10th of July, 1885, the cause came on for trial, and the trial continued from day to day until July 30, 1885, when the court took it under advisement and did not make special findings or enter judgment until February 1, 1886. (Rec., 30.) After the trial was concluded, and January 19, 1886, while the court held the case under advisement, plaintiff filed a second motion to remand, and on February 1, 1886, applied for leave to amend the declaration, which latter application was then allowed and the amendment was filed *instanter*. (Rec., 28 and 29.) On the same day the court overruled the motion to remand, filed special pleadings and entered judgment thereon. (Rec., 29 and 30.)

No plea to the jurisdiction was at any time filed.

It is insisted that neither of the two grounds for re-

moval set forth in the petition were sufficient, and that this court should dismiss the writ of error for this cause.

A motion to remand, like a demurrer, can only be heard upon the face of the whole record. Jurisdictional facts, *dehors* the record, such as citizenship—must be raised by plea to the jurisdiction.

Clarkhuff v. *Wisconsin, I. & N. R. Co.* 26 Fed. R., 465;
LaCroix v. *Lyons*, 27 Fed. R., 403;
Smith v. *Kernochen*, 7 How., 198;
De Wolf v. *Ruband*, 1 Pet., 476;
DeSobry v. *Nicholson*, 3 Wall., 421;
Wickliffe v. *Owings*, 17 How., 51, 52;
Shippard v. *Graves*, 14 How., 505, 513.

The dermination of the issue made upon such a plea is conclusive, and the question cannot be raised again.

Sharon v. *Hill*, 26 Fed. R., 722.

If the first motion was treated by consent of parties, as it seems to have been, as a plea—the decision of the court upon it was conclusive.

Under this state of facts this court should retain jurisdiction unless compelled to relinquish it.

On a motion to remand a cause, the petition for removal is the basis of jurisdiction. It is not in the province of the pleadings in the State court to state the grounds of jurisdiction in the United States Circuit court.

Kissinger v. *Hinkhouse*, 27 Fed. R., 883.

The statements of the petition for removal are *prima facie* true as against the statements of the pleadings filed in the State court.

Clarkhuff v. *Wisconsin I. & N. R. Co. et al.*, 26 Fed. R., 465.

The record in the State court is silent as to citizenship.

John I. and Frank I. Bennett were clearly improper parties. The petition for removal states "that neither "John I. Bennett nor Frank I. Bennett were, nor were "either of them in possession of said lands described in "said declaration at the time of the commencement of "said suit, nor have they either of them since been in "possession thereof, nor did they or either of them own "said real estate or any portion thereof, at the said time "of the commencement of said suit, nor have they or "either of them since acquired title thereto; that they "are unnecessary and improper parties defendant to said "suit." (Rec., 13.)

The suit was commenced November 8, 1882. (Rec., 2.) On the trial it was shown that the Bennetts had conveyed to Jordan, October 4, 1882, and no proof was made of any subsequently acquired interest, or that they were in possession. (Rec., 46.)

This is further shown by Jordan's affidavit. (Rec., 8.)

In fact, counsel concedes they are nominal, and not necessary parties. (See Brief, 37.)

The contention as to citizenship is narrowed to defendant Smale.

Subsequent to the commencement of the suit, *but before the removal*, Smale surrendered his lease to Jordan, and entered into a new one in which he expressly "agrees "to hold said premises subject to the *lis pendens* of this "suit as against petitioner and to be subject to any "process which may be issued thereon, and that "*he, the said Smale, hath no rights under said substituted* "*lease.*" (Rec., 14.)

After this was done and the landlord, Jordan, had be-

come a party, and liable to the judgment and process of this court, Smale became an unnecessary or nominal party.

He had in effect disclaimed all interest in the property, or its possession, and could have been dismissed out without detriment to the interest or remedy of the plaintiff, and thenceforward should be considered as a nominal party.

After that had occurred there was no controversy between him and the plaintiff. Jordan became the real contestant.

If, prior to the removal, no steps had been taken to discharge Smale from the position he occupied when the suit was commenced, the case would have been like that of *Phelps* v. *Oakes*, 117 U. S., 888, cited by counsel for the plaintiff in error. The statute required the suit to be commenced against the person in possession, and the admission of the landlord as a co-defendant did not dispense with the necessity of having the occupant a party. But in this case Smale had been divested of all interest by the express provisions of the lease, made after the commencement of the suit, but before the petition for removal. A judgment rendered against Jordan would have evicted Smale from the possession of the premises.

Under the Illinois statute, a judgment rendered against a tenant in an action of ejectment is conclusive as a title against the landlord, whether the landlord had notice or not. The only remedy the landlord has against the tenant for failure to give notice to him of the commencement of such a suit is the recovery of two years' rent. This remedy, practically, is of no value to the landlord. It certainly does not restore him the land which he may lose by the neglect of the tenant.

Process issued upon a judgment against Jordan would be warrant for eviction of Smale, who is shown to have held *pendente lite without any right or claim of right to the possession or property.*

Nelson v. *Hennessey et al.*, 33 Fed. R., 113.

Bacon v. *Felt*, 38 Fed. R., 368.

It is said in the case of *Phelps* v. *Oaks*, 117 U. S., 237, the rights of the landlord "could not be concluded "by a judgment against the tenant." * * * "At "any rate, the plaintiffs had a right to eject the defend- "ant, who actually and unlawfully withheld from them "the possession."

In this case the record shows that the plaintiff was a citizen of Illinois, and Jordan of New York. The omission to state expressly the citizenship of Mitchell in the petition for removal, was waived by the subsequent proceedings in the United States court, in which he participated, going to trial by agreement. It is not like the case of *Cameron* v. *Hodges*, 127 U. S., 324, which was a direct proceeding from the order of removal.

But the petition for the removal of said suit also embraces, as a second ground therefor, that it is a suit arising under the laws of the United States.

This branch of the petition for removal is as follows:

"Your petitioner states that said suit is one arising "under the laws of the United States in this, to wit: that "plaintiff seeks in and by said suit to recover lands em- "braced in a survey of public lands made by the govern- "ment of the United States in 1874, embracing a part of "said section 20, Tp. 37 N., R. 15 E., 3d P. M. in Illinois, "and patents issued under said survey under which your

"petitioner deraigned title in fee simple before the com-
"mencement of said suit, and in him vested by convey-
"ance from the patentee.

"That the plaintiff claims that he is seized of the frac-
"tional tract described in the declaration as the grantee
"of Horatio B. De Witt, that the said survey, patents and
"deeds to petitioner are not made in pursuance of the
"acts of Congress and laws of the United States relating
"to the surveying and disposition of the public lands of
"the United States, and that said act of Congress and
"laws have been misconstrued by the said land depart-
"ment and disregarded, and that said survey, patents,
"deeds, and the proceedings of the land department are
"illegal and void, and in violation of the contract rights
"of said Mitchell under the laws of the United States;
"that by virtue of the alleged ownership of said frac-
"tional tract described in the declaration he, the plaint-
"iff, under and in pursuance of said act of Congress and
"laws of the United States, is also the owner of said
"lands so owned by your petitioner by virtue of said
"survey of 1874, and patents and deeds thereunder.
"This petitioner claims title in fee to said lands other
"than said fractional tract by virtue of said survey of
"1874, said patents and deeds issued thereunder in pur-
"suance of the act of Congress aforesaid, and laws of
"the United States, and therefore states that said suit is
"one arising under the laws of the United States entitling
"his petitioner to a removal of the suit under the act of
"Congress entitled 'an act to determine the jurisdiction
"of the Circuit courts of the United States, and to regu-
"late the removal of causes from the State courts, and
"for other purposes,' in force March 3, 1875."

It was not necessary that this ground for removal should be set forth in the pleadings.

Kissinger v. *Hinkhouse*, 27 Fed. R., 883.
Clarkhuff v. *Wisconsin, I. & N. R. Co. et al.*, 26 Fed. R., 465.

Indeed, in an action of ejectment in Illinois this is impossible.

The allegations of this branch of the petition for removal now under consideration are, in substance, that plaintiff seeks to recover lands surveyed and patented in 1874, and thereafter, under which petitioner held and claimed title; that said lands were surveyed and patents issued under and in pursuance of acts of Congress constituting the body of land laws of the United States in force at the time said lands were so surveyed and patented; that plaintiff claims title to the same lands solely in virtue of the alleged ownership of a fractional tract, surveyed and patented to Horatio B. De Witt, prior to the survey and patent of defendant's lands in 1874; that said fractional tract was surveyed and patented under and in pursuance of acts of Congress constituting the body of land laws of the United States in force when said prior survey was made; that by virtue of the ownership of said fractional tract, and under and in pursuance of said acts of Congress and laws of the United States, plaintiff has also become the owner of said lands so surveyed in 1874; that the said survey and patents to said lands, other than this said fractional tract, are not made in pursuance of said acts of Congress and the laws of the United States relating to the survey and disposition of the public lands of the United States, and that said acts of Congress and laws have been misconstrued by the said Land Department, and that

said survey, patents and proceedings of the Land Department, under which petitioner claims title, are illegal and void, and in violation of the contract rights of the plaintiff under the laws of the United States.

This ground of removal was held by Judge Blodgett, Judge Drummond concurring, in 1883, when the first motion to remand was made, as sufficient.

These allegations would seem to be sufficient to show that the construction of a law of the United States is necessarily involved in the case. When reference is made to a body of Congressional enactments, under and in pursuance of which the government, through its Land Department, disposes of its public lands, it would seem to be sufficient without requiring an enumeration of the special acts of Congress, constituting the body of laws, through and by virtue of which its titles are deraigned.

In the case of *The Frank G. & S. M. Co.* v. *Larimer M. & S. Co.*, 8 Fed. R., 724, where the contest was between two claimants—the one asserting a claim under the mining laws of the United States, and the other under other acts of Congress providing for the acquirement of title to the public lands of the United States, after removal, "on the ground that the subject-matters of the "action arise under the laws of the United States," a motion was made to remand. From the report of the case it must be inferred that the objection to the allegations of the petition were that no specific act of Congress is named in the petition for removal.

The late Justice Miller, sitting on the circuit, in deciding the motion said. "It is impossible that such an ac- "tion as this can be determined without reference to, "and involving a construction of, the mining laws of

"Congress. The questions involved necessarily arise "under the laws of the United States."

Counsel says in his brief, he "does not deny that in a "proper case, *e. g.*, a suit in equity to set aside the pat- "ents and deeds, under the second survey, upon the "ground that the officers of the general government "were without power to order the survey, and issue the "patents thereunder (as they most certainly were) a "federal question might arise." (Plffs.' brief, 41.)

If in the case conceded by counsel, why not in the case at bar?

The record in this case shows that the patent to Condit, and the authority of the officers of the land department in the proceedings culminating in the patent were contested for want of authority in virtue of the land laws of the United States, and that the patent through which Jordan deraigns title is void.

In the case at bar, as well as in the chancery case, supposed by counsel, in order to determine whether the Condit patent is void it is necessary to construe and call in question the acts of Congress upon which the proceedings culminating in the patent were based.

It is said in *Western Union Telegraph Co.* v. *National Telegraph Co. et als.*, 19 Fed. R., 561: "Cases arising "under the laws of the United States within the mean- "ing of the removal act, are such as grow out of the "legislation of Congress, whether they constitute the "right, claim, protection, or defense, in whole or in part, "of the party by whom they are asserted. If a federal "law is to any extent an ingredient of the controversy "by way of claim or defense, the condition exists upon "which the right of removal depends, and the right is

"not impaired because other questions are involved "which are not of a federal character."

In the case at bar, as we have seen, laws of the United States were actually drawn in question at the trial; but that need not be the case. It was held by Judge Drummond in the *State of Illinois* v. *The Chicago, Burlington & Quincy R. R. Co.*, 16 Fed. R., 707, that where it appears by the record that there is a federal question in a case, the jurisdiction is sustained, whether the claim shall be finally in fact sustained or not.

It was held in *Willard, trustee*, v. *Mueller*, 23 Fed. R., 209, that where an act of Congress declares transfers of claims against the United States, unless freely made, null and void, a bill filed to compel assignment of such a claim involved a law of the United States.

Where a bridge has been built across a navigable river under the alleged authority of an act of the state legislature, and a subsequent act of Congress, claimed to ratify it, and mandamus was brought to compel the construction of a draw or its removal, it was held to be a case arising under the laws of the United States.

New Orleans, Mobile & Texas R. R. Co. v. *Mississippi*, 102 U. S., 135.

Sowles v. *Witters*, 43 Fed. R., 700, was a case brought to recover property solely acquired by a receiver of a National Bank, under the direction of the comptroller of the currency, and removed by the receiver. Upon a motion to remand, the court held, that the suit was one arising under the laws of the United States.

The very discussion in which counsel indulges in his brief in this case is practical proof of the necessity of calling in question acts of Congress. Counsel has no diffi-

culty in designating what acts are involved and urging his construction of them.

The second and third assignments of error question the right of admission of oral and documentary evidence.

These assignments are clearly without merit. The introduction of oral evidence in connection with maps and charts, in investigations of this sort, is a necessary and every-day occurrence.

Some of the documents objected to are the patent from the United States, and title deeds under which defendant Jordan claims title.

As to oral evidence and the maps and charts referred to, it is deemed unnecessary to refer to any other cases than those heretofore cited in this argument, to establish the correctness of the rulings of the court in this respect.

Granger v. *Swart*, 1 Wol., 90.
Lammers v. *Nissen*, 4 Neb., 245.
Glenn v. *Jeffery*, 75 Iowa, 20.
Bisseil v. *Fletcher*, 19 Neb., 726.

This evidence was clearly admissible.

The assignments of error, from the fourth to the eleventh inclusive, are in respect to alleged errors of the court, as it did; and, are all covered by the preceding discussions of this argument. I do not deem it necessary to dwell further upon them.

The twelfth and last assignment of error, is, " because " the special findings are contrary to law and the evi- " dence."

This court will not enquire as to whether the special findings of a Circuit judge, trying a cause by consent of

parties, without the presence of a jury, are supported by the evidence or not. The facts found must be accepted as true.

Booth v. *Tiernan*, 109 U. S., 205.
Prentice v. *Stearns*, 113 U. S., 435.

The stipulation of the parties in writing, and in pursuance of the statute, that a jury be waived, and the cause tried by the court, was duly filed. (Rec., 24.)

The special findings were in compliance with the law.

It is respectfully submitted that the judgment of the Circuit court should be affirmed.

W. C. Goudy,
For Defendants in Error.